89-1344

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ENSERCH EXPLORATION, INC., AS
MANAGING GENERAL PARTNER OF
EP OPERATING COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Under the Natural Gas Policy Act of 1978 ("NGPA"), "first sales" of natural gas may either be subject to specified price ceilings or are deregulated, depending upon an NGPA category "determination" made by the Federal Energy Regulatory Commission under Section 503 of the NGPA. The question presented is:

Whether the Courts of Appeals have jurisdiction under Section 506(a)(4) of the NGPA, the general judicial review provision, to review orders of the Federal Energy Regulatory Commission "reopening" final determinations that gas produced from identified wells is "high cost" natural gas.

RULE 14.1(b) LISTING OF PARTIES

Petitioner

Enserch Exploration, Inc., as Managing General Partner of EP Operating Company

Respondent

Federal Energy Regulatory Commission

Intervenors

Delhi Gas Pipeline Company
Southern California Gas Company
Texas Eastern Transmission Corporation
The Travis Peak Producers Group:
Texas Crude, Inc.
Wessely Energy Company
Herd Producing Company, Inc.

RULE 29.1 LISTING

Enserch Exploration, Inc. is the Managing General Partner of EP Operating Company. Enserch Corporation, a Texas Corporation, is the parent of Enserch Exploration Inc. A listing under Rule 29.1 naming all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Enserch Corporation and Enserch Exploration, Inc. is as follows:

Name of Company	*State or County of Incorporation*
ENSERCH Corporation	Texas
Enserch International Investments Limited	Delaware
Canatom Heavy Water Limited	United Kingdom
Humphreys & Glasgow Consultants Private Limited	India
INITEC-Humphreys & Glasgow Procesos S.A.	Spain
Humphreys & Glasgow Inc.	Delaware
Earl and Wright	California
H&R-E&W Pty. Ltd.	Western Australia
British Offshore Engineering Technology Limited	United Kingdom

Enserch Holdings (U.K.) Limited	United Kingdom
Losinger AG	Switzerland
Losinger USA, Inc.	Delaware
Losinger Immobilien AG	Switzerland
Losinger Chile y Campania Limitada	Chile
Losinger Ltd.	Kenya
Losinger Sdn. Bhd.	Malaysia
Losinger	Chile
Valencuela Ltda.	Chile
Fietz & Leuthold AG	Switzerland
J. Bariatti S.A.	Switzerland
Losinger Bau AG	Switzerland
Losinger Bauunternehmung AG, Luzern	Switzerland
Baufinag S.A.	Switzerland
Repave AG	Switzerland
Losinger Delemont S.A.	Switzerland
Losinger Fribourg S.A.	Switzerland
Sables et Graviers Tuffiere	Switzerland
Losinger S.A. Crissier	Switzerland
Losinger S.A., Sion	Switzerland
Losinger Ticino S.A.	Switzerland
Lumesa S.A.	Switzerland
Moos AG	Switzerland
Prader AG	Switzerland
Prader Tunnelbau GmbH	West Germany
Prader & Co. AG	Switzerland
Hediger Hoch-und Tiefbau AG	Switzerland
Losag AG	Switzerland
BAB Bau AG, Brienz	Switzerland
Binladin-Losinger Ltd.	Saudi Arabia
VSL International Ltd.	Switzerland
Presyn AG	Switzerland
VSL Corporation	California
International Construction Systems, Ltd.	Canada
VSL Prestressing Pty. Ltd.	Australia
VSL Stressbar Pty. Ltd.	Australia
VSL Engineering Pty. Ltd.	Australia
VSL Systems Pte. Ltd.	Singapore
Suspa GmbH Laugenfeld	Germany
VSL Far East	Singapore
Rudloff-VSL Protendidos Ltda Singapore	Brazil
VSL France S.a.r.l.	France
Produits Brosset S.a.r.l.	France
VSL Italia S.p.a.	Italy

Preco s.r.l.	Italy
VSL Indonesia	Indonesia
VSL Korea	
VSL Engineers (M) Sdn. Bhd.	Malaysia
VSL Engineers Hong Kong Ltd.	Hong Kong
VSL Thailand	Thailand
VSL Systems (B) Sdn. Bhd.	Brunei
VSL Japan	Japan
Dorsch Consult AG	West Germany
Pool Company	Texas
Pool Americas, Inc.	Texas
Seamaster Offshore Inc.	Canada
Pool International, Inc.	Texas
Pool Arabia, Ltd.	Saudi Arabia
Intairdril Oman L.L.C.	Oman
Pool Santana, Limited	Trinidad/Tobago
Intairdril Ltd.	Cayman Islands
Antah Drilling Sdn. Bhd.	Malaysia
Pool Pakistan Drilling Ltd.	Cayman Islands
Intairdril (U.K.) Limited	United Kingdom
Pool-Wood Production Services (U.K.) Limited	United Kingdom
The International Air Drilling Company	Texas
Intairdril Libya Limited	Libya
Triveni Pool Intairdril Limited	India
Oiltools International Ltd.	Cayman Islands
Antah Oiltools Sdn. Bhd.	Malaysia
Antah Oiltools (S) Pte.Ltd.	Singapore
Antah Oiltools Services Sdn. Bhd.	Malaysia
Fischer-Oiltools (Philippines), Inc.	Philippines
Oiltools (Thailand) Limited	Thailand
Ebasco Services Incorporated	New York
Ebasco Industries Inc. (Delaware)	Delaware
Ebasco-CTCI Corporation	Taiwan
Ebasco Dorsch Consultants Inc.	Delaware
Ebasco Arabia Limited	Saudi Arabia
Ebasco Energy AG	Switzerland
Ebasco Espana, S.A.	Spain
EP Operating Company	Texas
Enserch Exploration Partners, Ltd.	Texas
Enserch Processing Partners, Ltd.	Texas
Encogen One Partners, Ltd.	Texas
Encogen Four Partners, L.P.	Delaware
Freehold Cogeneration Associates, L.P.	Delaware

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Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Enserch Exploration, Inc., as Managing General Partner of EP Operating Company ("EPO"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on October 30, 1989.

OPINIONS BELOW

The opinion of the Fifth Circuit (App. 1a-14a) is reported at 887 F.2d 81. The order denying EPO's timely petition for rehearing (App. 93a) is not reported. The orders of the Federal Energy Regulatory Commission ("Commission") under Section 503(d) of the Natural Gas Policy Act of 1978, 92 Stat. 3397, 15 U.S.C. § 3413 (d), that reopened the well category determinations in question are reported at 41 F.E.R.C. (CCH) ¶ 61,242

(1987) (App. 51a-58a), and 42 F.E.R.C. (CCH) ¶ 61,075 (1988) (App. 81a-87a).

JURISDICTION

The opinion of the Fifth Circuit was issued on October 30, 1989. The court denied EPO's petition for rehearing on November 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 506(a)(4) of the Natural Gas Policy Act of 1978, 92 Stat. 3404, 15 U.S.C. § 3416(a)(4).

STATUTORY PROVISIONS INVOLVED

1. Section 503 of Title 15 of the United States Code, 15 U.S.C. § 3413, which sets forth the procedures by which natural gas is determined to qualify for one or more of the various incentive price categories established under the Natural Gas Policy Act of 1978, 92 Stat. 3352, *et seq.*, 15 U.S.C. §§ 3301-3432, is reproduced at App. 94a-99a.

2. Section 506 of Title 15 of the United States Code, 15 U.S.C. § 3416, which sets forth the procedures, authority and standards for judicial review of Commission action under the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432, is reproduced at App. 99a-102a.

STATEMENT OF THE CASE

The opinion of the United States Court of Appeals below dismissed, for lack of jurisdiction, EPO's petition for review of Commission orders issued in 1987 and 1988. Those orders "reopened" seventy-three final determinations that natural gas produced from wells completed in the Travis Peak Formation, a geologic formation containing natural gas that lies beneath forty-seven counties in East Texas, qualified for an incentive price as "tight formation" wells.

I. BACKGROUND

The Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 ("NGPA"), "comprehensively and dramatically changed the method of pricing natural gas produced in the United States." *Public Service Commission of the State Of New York* v. *Mid-Louisiana Gas Company*, 463 U.S. 319, 322 (1983). Title I of the NGPA defines discrete categories of natural gas production, and specifies the applicable maximum lawful prices for "first sales" for each category. *See* 15 U.S.C. §§ 3312-3319.[1]

Section 503(b) of the NGPA, 15 U.S.C. § 3413(b), establishes the procedure by which natural gas becomes eligible for certain of the pricing categories established in the NGPA. A state or federal agency having regulatory jurisdiction over the production of gas (the "jurisdictional agency"), on the application of a producer, determines if a particular well or gas is eligible for incentive pricing under NGPA Section 102, 15 U.S.C. § 3312 (new natural gas and certain Outer Continental Shelf gas); Section 103, 15 U.S.C. § 3313 (new onshore production wells); Section 107, 15 U.S.C. § 3317 (high-cost natural gas); and Section 108, 15 U.S.C. § 3318 (stripper well gas).

The Commission reviews these determinations. The Commission *must reverse* the jurisdictional agency's determination if it finds that the determination is not supported by substantial evidence; the Commission *may re-*

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[1] Prior to enactment of the NGPA, the Commission (and its predecessor, the Federal Power Commission) regulated the prices charged by producers of gas in the interstate market under the Natural Gas Act, 15 U.S.C. §§ 717-717w. Interstate producer rate regulation was effectuated through national ceiling price orders that established different price levels depending on the date the producing well was commenced. The NGPA, by contrast, "generally adopted an incentive-based approach to rate-setting for gas production, providing substantially higher prices for 'new' gas than was currently available." Ecee, Inc. v. FERC, 645 F.2d 339, 345 (5th Cir. 1981).

mand a determination to the jurisdictional agency if the determination is inconsistent with information in the Commission's public records that was not before the jurisdictional agency when the determination was made. Section 503(b) sets forth specific time limits within which the Commission must act on a determination once the determination has been received. If the Commission fails to act within the time limits, the determination becomes "final."

In Section 107 of the NGPA, 15 U.S.C. § 3317, Congress authorized the Commission to establish, "by rule or order," a "special price" which is "necessary to provide reasonable incentives for the production of . . . high cost natural gas." 15 U.S.C. § 3317(b). Acting under this authority, the Commission issued regulations which established an incentive price for gas produced from "tight formations," sedimentary layers of rock cemented together in a manner that greatly hinders the flow of any gas through the rock. *Regulations Covering High-Cost Natural Gas Produced From Tight Formations*, 45 *Fed. Reg.* 56034 (August 22, 1980) *reh'g denied and clarified*, 45 *Fed. Reg.* 71563 (October 29, 1980), *aff'd, Pennzoil Company* v. *FERC*, 671 F.2d 119 (5th Cir. 1982).[2] The Commission determined that "tight formation gas" qualified for an incentive price because such formations are generally characterized by low permeability. As a result, "wells drilled into gas-bearing formations of this kind usually produce at very low rates. To stimulate production [of gas] from these formations, producers must use expensive enhanced recovery techniques." Order No. 99, *supra*, 45 *Fed. Reg.* at 56035. In Order No. 99, the Com-

[2] In an Initial Rule issued on February 12, 1990, the Commission terminated in part the tight formation ceiling price, but only for wells spudded or recompleted after May 12, 1990. *Limitation on Incentive Prices For High Cost Gas To Commodity Values*, FERC Docket No. RM82-32-002 (Order No. 519). The Commission's Order No. 519 would in no way affect the wells that are at issue in this case.

mission established procedures under which the "jurisdictional agencies" responsible for supervision of natural gas production activities in the respective states and on federal lands would "recommend" to the Commission that a formation receive the tight formation designation. The Commission also established guidelines for evaluating whether a given formation should be designated as a tight formation. 18 C.F.R. § 271.703(c).[3]

II. PROCEEDINGS BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

A. Designation Of The Travis Peak Formation

In November, 1981, the Railroad Commission of the State of Texas ("TRC") submitted a recommendation to the Commission that the Travis Peak Formation receive designation as a tight formation, in accordance with the procedures established in Order No. 99. Following several years of controversy between the Commission and the TRC over the proper methodology for evaluating the geological characteristics of the Travis Peak,[4] on May 23, 1986, the Commission designated the Travis Peak as a tight formation, with several minor modifications. *High-*

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[3] The guidelines contain standards for the expected permeability of the rock, the expected gas productivity in an unstimulated state, and the expected production of oil in association with gas from the formation. App. 103a.

[4] The TRC based its conclusion that the Travis Peak Formation qualified as a tight formation on a methodology known as "geometric mean averaging." The geometric mean averaging approach is based upon the recognition that permeability in a geological formation follows of lognormal distribution, which is a skewed geometric distribution. The geometric mean average is calculated by taking the logarithm of each permeability value and dividing by the total number of values. By contrast, the Commission employed an arithmetic averaging methodology, under which it simply adds the permeability and flow rate figures for each well, and divides by the number of wells. *See* Order No. 450, 52 *Fed. Reg.* at 2402 n. 6; App. 20a n. 6.

Cost Gas Produced From Tight Formations, 51 *Fed. Reg.* 19164 (May 28, 1986), III FERC Stats. and Regs. [Regs. Preambles] (CCH) ¶ 30,698 (1986) ("Order No. 450") (App. 17a-27a).

B. Individual Well Category Determinations

Order No. 450 became effective thirty days following publication in the *Federal Register*. After the effective date (June 23, 1986), eleven operators of wells drilled into the Travis Peak, including EPO, applied to the TRC for individual tight formation well determinations under Section 503 of the NGPA and the Commission's Regulations.[5] The TRC subsequently issued orders which determined those wells to qualify as tight formation wells, and forwarded the determinations to the Commission. Under NGPA Section 503(b), the Commission has the authority to reverse or remand well determinations, if it makes an appropriate preliminary finding and notice thereof to the jurisdictional agency within forty-five days of the date the Commission received the notice. 15 U.S.C. § 5413(b). In this case, the Commission took no action with regard to the seventy-three wells within the forty-five day period; hence, the wells' status as tight formation wells became "final" under the statute.

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[5] 18 C.F.R. §§ 274.101-274.501; 18 C.F.R. §§ 275.101-275.206. In addition to qualifying the tight formation as a whole, producers of gas from that formation must also qualify each well drilled into and completed in that formation as either a "new" or "recompletion" "tight formation well." In addition to a showing that the well is completed in a tight formation, the well operator must show (1) either the surface drilling or recompletion of the well was begun on or after July 16, 1979, the date on which President Carter encouraged establishment of the tight formation incentive program, in an address to Congress; and (2) the gas also qualifies under NGPA Sections 102 (new natural gas) or 103 (gas produced from a new, onshore production well).

C. Consideration Of The Travis Peak Formation Under The Section 503 Procedures

On January 9, 1987, over seven months after issuance of Order No. 450, the Commission vacated that order, based in part upon a rehearing request filed by an intrastate pipeline company that purchased gas in the Travis Peak Formation. *High-Cost Gas Produced From Tight Formations*, 52 *Fed. Reg.* 2401 (January 22, 1987) (App. 28a-41a). The Commission reopened the record to permit supplementation with additional data, and set the proceeding for formal hearing. In the order, the Commission acknowledged its awareness that "a number of Travis Peak well determinations have become final under 18 C.F.R. § 275.202(a) (1986)." 52 *Fed. Reg.* at 2403 n.15; App. 35a, n.15. The Commission indicated that those final determinations would be "addressed" in a separate order. 52 *Fed. Reg.* at 2403 n.15; App. 35a, n.15.

The formal hearing ordered by the Commission never took place. While the proceeding was still in the prehearing stage, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in *Williston Basin Interstate Pipeline Company* v. *FERC*, 816 F.2d 777 (1987). There, that Court held that judicial review of tight formation designations was controlled by Section 503 of the NGPA, the well category determination provision, rather than the Commission's general rulemaking authority under Section 501 of the NGPA, which the Commission had relied on in Order No. 99 as its authority for designating tight formations. Although that Court did not determine whether the procedure that the Commission substituted for the Section 503 procedure "was in any way defective," 816 F.2d at 783, the Commission amended the regulations by which it designated tight formations. The Commission determined on its own to utilize prospectively the Section 503 procedure to designate tight formations. *Procedures For De-*

termining High-Cost Natural Gas Produced From Tight Formations, 52 *Fed. Reg.* 29003 (August 5, 1987) III F.E.R.C. Stats. and Regs. [Regs. Preambles] (CCH) ¶ 30,759 (1987) ("Order No. 479").

Adopting the new designation procedures in lieu of the previous rulemaking procedures, the Commission issued a notice of preliminary finding that the Travis Peak designation should be remanded to the TRC, on the same day that Order No. 479 was issued. *Texas Railroad Commission, Travis Peak Formation*, 40 F.E.R.C. ¶ 61,100 (1987) (App. 42a-50a). The Commission based its preliminary determination on a finding that the TRC's determination was not consistent with the information in the Commission's public files. Following a "comment period" in which the Commission heard from several Travis Peak producers (including EPO) and others, the Commission issued a final finding remanding the Travis Peak determination to the TRC. *Texas Railroad Commission, Travis Peak Formation*, 41 F.E.R.C. (CCH) ¶ 61,213 (1987) ("Remand Order"). App. 59a-79a.

D. Reopening The Seventy-Three Final Tight Formation Wells

On the same day the Commission ordered the Travis Peak determination remanded to the TRC, the Commission issued an order reopening the seventy-three final tight formation well determinations, purporting to act under Section 503(d). *Texas Railroad Commission, Travis Peak Formation*, 41 F.E.R.C. (CCH) ¶ 61,242 (1987). ("Reopening Order"). App. 51a-58a. The Commission acknowledged that under Section 503(d), a final well determination is binding upon the Commission unless, in making the determination, (1) the Commission or the jurisdictional agency (in this case, the TRC) "relied on any untrue statement of material fact" or (2) "there was omitted a statement of material fact neces-

sary to make the statements not misleading, in light of the circumstances under which they were made." *Id.*, at 61,635. The Commission found that the well determinations had been based upon an "untrue fact," because (1) the Commission had vacated its order designating the Travis Peak Formation as a tight formation, and (2) the Commission had remanded the Travis Peak Formation to the TRC for further proceedings. App. 57a.

In subsequent orders, the Commission dismissed EPO's requests for rehearing of both the Remand Order and Reopening Order. *Texas Railroad Commission, Travis Peak Formation,* 42 F.E.R.C. (CCH) ¶ 61,074 (1988) (App. 87a-92a) and 42 F.E.R.C. (CCH) ¶ 61,075 (1988) (App. 80a-86a). The Commission held that rehearing of the Remand Order did not lie, because Section 503(b)(4) of the NGPA provided for direct judicial review (App. 90a); further the Commission held that rehearing of the Reopening Order did not lie because the order was "procedural in nature" (App. 83a). With respect to the Reopening Order, the Commission did not indicate any other statutory basis upon which rehearing was denied.

III. PROCEEDINGS BEFORE THE COURT OF APPEALS

EPO filed petitions for review of both the Reopening Order and the Remand Order with the Fifth Circuit, which that Court reviewed pursuant to its authority under Section 506(a)(4) of the NGPA. In its brief, the Commission contended, for the first time,[6] that the statutory scheme of the NGPA precludes judicial review of all Commission orders under Section 503 other than reversal and remand orders under Section 503(b), *citing Williston Basin Interstate Pipeline Company* v. *FERC, supra,* and *Mesa Petroleum Company* v. *FERC,* 688 F.2d

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[6] Although the Commission previously dismissed EPO's request for rehearing of the Reopening Order, the Commission did not suggest that rehearing was precluded by the statutory scheme of the NGPA.

1014 (5th Cir. 1982). The Fifth Circuit dismissed EPO's petition for review of the Reopening Order for lack of jurisdiction, and affirmed the Remand Order.[7] In its opinion, the Fifth Circuit held that under Section 503(c)(4) of the NGPA, 15 U.S.C. § 3413(c)(4), "the Commission's NGPA related determinations, including determinations such as the one presented by the instant case, 'shall not be subject to judicial review under any Federal or State law except as provided under subsection (b)' of this section." 887 F.2d at 87; App. 12a. The Fifth Circuit stated that because subsection 503(b) limits judicial review to cases in which the Commission reverses or remands a jurisdictional agency determination, a court could not review a Commission order under Section 503(d) reopening a final determination. The court, however, remarked that the Commission had exceeded its Section 503(d) authority by reopening the final determinations based on its finding that *Commission's own designation* of the Travis Peak Formation was an "untrue statement of fact:"

> We are persuaded that Congress did not intend for the Commission to exercise its § 503(d)(1)(A) "untrue statement of a material fact" reopening authority in such a manner. If such were the case, every local regulatory authority decision with which the Commission disagreed would be automatically reviewable.

887 F.2d at 87 n.10. App. 13a n.10. EPO sought rehearing of the portion of the Fifth Circuit's opinion that dismissed EPO's petition for review of the Reopening Order. The Fifth Circuit denied rehearing on November 30, 1989.

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[7] The Travis Peak Formation proceeding is currently pending before the TRC. The TRC had stayed the remand pending the Fifth Circuit's action on EPO's petition for review. Although EPO continues to believe that the Fifth Circuit erred in remanding the Travis Peak proceeding to the TRC, EPO seeks review by this Court only with regard to the Reopening Order.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW IS IN CONFLICT WITH HOLDINGS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

This case presents an important issue of first impression in the administration of the NGPA. The opinions of two circuits are in conflict with regard to this issue. The Fifth Circuit's holding that it lacks jurisdiction to review orders in which the Commission purports to exercise its authority under Section 503(d) conflicts directly with the opinion in *ANR Pipeline Company* v. *FERC*, 870 F.2d 717 (D.C. Cir. 1989). In *ANR*, the District of Columbia Circuit reviewed and affirmed Commission orders under Section 503(d) in which the Commission refused to disturb a final well determination. Unless this conflict between the District of Columbia and Fifth Circuits is resolved, it appears that the District of Columbia Circuit will review, pursuant to the general judicial review provision of the NGPA, Section 506(a)(4), orders issued under Section 503(d), but the Fifth Circuit will not review such orders.

This Court should resolve this conflict between the District of Columbia and Fifth Circuits by holding that Section 506(a)(4) of the NGPA provides for judicial review of Commission orders issued under Section 503(d). Without such review, the Commission may continue to misapply the standards of Section 503(d), without any possibility for corrective action on judicial review in the Fifth Circuit. In declining review, the Fifth Circuit stated that the Commission had *misapplied* Section 503(d). The Fifth Circuit's own statements thus underscore the importance of judicial review of Commission action under Section 503(d), and the importance of consistent interpretation by the different circuits.

ANR involved two final well category determinations. Conoco Inc. had applied to the United States Geological

Survey (now the Minerals Management Service) for determinations that two wells qualified under Section 102 (d) ("new natural gas") on the basis of data submitted which showed that the gas produced by each well came from a reservoir discovered on or after July 27, 1976. Under Section 503(b) and the Commission's Regulations, the two determinations became final on June 28, 1979, forty-five days after notification. *ANR Pipeline Company* v. *Conoco Inc.*, 40 F.E.R.C. (CCH) ¶ 61,278, *reh'g denied*, 43 F.E.R.C. (CCH) ¶ 61,061 (1988), *aff'd sub nom. ANR Pipeline Company* v. *FERC* 870 F.2d 717 (D.C. Cir. 1989).

Based on *subsequently*-developed information, Conoco became persuaded that the gas produced from the two wells in question actually originated in a reservoir discovered before July 27, 1976, and thus did not qualify for incentive pricing under Section 102(d). Conoco filed a petition to reopen and vacate the determinations. However, Conoco withdrew the petition, after the Commission issued a declaratory order in *Mobil Oil Exploration & Producing Southeast Inc., et al.*, 34 F.E.R.C. (CCH) ¶ 61,211 (1986), in which it held that Section 503(d) did not require the reopening of a final well category determination that was contradicted by *later*-acquired information.

Following withdrawal of Conoco's petition, ANR filed a complaint with the Commission seeking the same result, that is, the reopening and vacation of the two well category determinations. The Commission dismissed ANR's complaint, finding that Conoco had submitted "all relevant information to MMS at the time the applications were processed" and that the information available to the agency was "correct and complete." *ANR Pipeline Company* v. *Conoco Inc.*, 40 F.E.R.C. (CCH) ¶ 61,278 at p. 61,909.

In *ANR*, the District of Columbia Circuit affirmed the Commission's interpretation of Section 503(d) as "not

merely permissible but, indeed, the most natural interpretation of Section 503(d)," employing the standard of review articulated by this Court in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984). 870 F.2d at 721. That Court stated that "[t]he Commission's focus on the facts *as they were known* at the time the determinations were made is consistent with Congress' use of the past tense throughout Section 503(d)." *Id.* at 721 (emphasis in original). Analyzing the statute further, that Court found that the reference in Section 503 (d) to 18 U.S.C. § 1001, which imposes criminal penalties upon anyone who "knowingly and willfully" provides a federal agency with false or misleading information, "strongly implies that the accuracy and completeness of the information submitted is to be judged on the basis of *contemporary* knowledge." *Id.* at 721 (emphasis in original). Finally, that Court found that the Commission's construction of Section 503(d) in *ANR* and *MOEPSI* "promotes one of the [NGPA's] principal goals," which is "giving producers confidence in the finality of the Commission's well determinations." *Id.* at 721.[8]

---

[8] The opinion in *ANR* is especially significant because the District of Columbia Circuit has specifically considered the question of its jurisdiction to review Commission action under Section 503. In *Williston*, that Court held that it lacked jurisdiction to review orders *affirming* the *designation* of a tight formation. That Court raised the jurisdictional issue on its own motion. *All* of the parties, including the Commission and the petitioner, contended that judicial review *was* authorized, because the Commission designated the tight formation pursuant to its general rulemaking authority under Section 501, and rulemaking orders are subject to judicial review. That Court rejected the position advocated by the parties, and held that judicial review of the designation was governed by Section 503. That Court held that Section 503 precluded judicial review in *Williston*, because the Commission *affirmed* the determination of the jurisdictional agency under Section 503(b). By contrast, in *ANR*, that Court correctly exercised its authority to review Section 503(d) orders under the generally-applicable review provision of the NGPA, Section 506(a)(4).

The conflict between the District of Columbia and Fifth Circuits relates to a matter of importance in the administration of the NGPA. Under Section 503 of the NGPA, over 400,000 wells have received well category determinations that established either price category or deregulated status for the gas produced from those wells. As the District of Columbia Circuit recognized in *ANR*, the administration of Section 503(d) "promotes one of the Act's principal goals. By giving producers confidence in the finality of the Commission's well determinations, the section (as interpreted) encourages the development of new energy supplies." *ANR*, 870 F.2d at 721 (citations omitted). By contrast, the Fifth Circuit's refusal to review Commission action under Section 503(d), even when the court acknowledged that the Commission has misinterpreted the provision, undermines the program.[9]

---

[9] The Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 102 Stat. 157 (1989) ("1989 Act"), deregulates certain categories of first sales prior to January 1, 1993, and provides for the complete decontrol of wellhead prices for first sales of natural gas as of January 1, 1993, by repealing Title I of the NGPA. The 1989 Act would repeal NGPA Section 503, effective January 1, 1993. Section 3(b)(6). However, the Section 503(d) authority of the Commission will be a matter of continuing concern until the January 1, 1993 decontrol date, and may present continuing uncertainty beyond that date. First, the 400,000 "final" wells *may* be subject to reopening and vacation beyond January 1, 1993. Moreover, in its Notice of Proposed Rulemaking to implement the 1989 Act, the Commission requested comments on the "desirability of continuing to allow producers to file applications for well determinations after the subject gas had otherwise been decontrolled. . . . in view of the fact that Section 29 of the Internal Revenue Code provides for a tax credit for the production of fuel from nonconventional sources. . . ." Proposal Implementing the Natural Gas Wellhead Decontrol Act of 1989, 54 *Fed. Reg.* 51902 (December 18, 1989). This rulemaking proceeding is presently in the comment stage before the Commission.

II. THE FIFTH CIRCUIT'S OPINION APPLIES PRINCIPLES OF STATUTORY INTERPRETATION TO THE NGPA IN A MANNER THAT DEPARTS FROM APPLICABLE DECISIONS OF THIS COURT.

A. Section 506 Is A Broad Grant Of Appellate Jurisdiction—Exceptions Must Be Narrowly Construed.

The Fifth Circuit's opinion "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup.Ct.R. 10.1(a). Section 506 of the NGPA, 15 U.S.C. § 3416, which generally governs judicial review of Commission orders issued under the NGPA, applies "to judicial review of *any* order, within the meaning of Section 551(6) of Title 5 (other than an order assessing a civil penalty under Section 3362 of this title or any order under Section 3363 of this title), issued under this chapter and to any final agency action under this chapter required to be made on the record after an opportunity for an agency hearing." 15 U.S.C. § 3416(a)(1); App. 99a (emphasis added). "The plain meaning of the statute decides the issue presented." *Bethesda Hospital Association* v. *Bowen*, 485 U.S. 399, 403 (1988), *quoted in FERC* v. *Martin Exploration Management Company*, 486 U.S. 204, 209, (1988). "In determining the scope of a statute, we look first to its language." *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), *quoted in United States* v. *Monsanto*, 57 U.S.L.W. 4826, 4827 (U.S. June 22, 1989). Thus, in the absence of an express exclusion, Section 506 applies to review of Commission orders issued under the NGPA, including orders issued under Section 503(d). Exceptions must be narrowly construed. *Abbot Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). Section 506 contains no exception to the general review provision applicable to orders reopening or vacating final determinations under Section 503(d). Therefore, by its express terms, the NGPA provides the courts of appeals with jurisdiction to review Commission orders issued under Section 503(d), such as the Reopening Order.

B. The Section 503(c)(4) "Exception" To Section 506 Jurisdiction Does Not Apply To Section 503(d) Orders.

While the *express language* of Section 506(a)(1) requires this Court to find that the courts of appeals have jurisdiction to review the Reopening Orders, the same conclusion is also supported by the language and design of the NGPA as a whole. *Bethesda Hospital Association* v. *Bowen*, 485 U.S. at 405. The Fifth Circuit held that Section 503(c)(4) limits judicial review to final determinations to reverse or remand under Section 503(b), and precludes judicial review of orders issued under Section 503(d) to reopen and vacate final determinations. 887 F.2d at 87 (App. 13a). However, the Fifth Circuit's reading "seriously misapprehends the nature of the provisions in question." *Monsanto*, 57 U.S.L.W. at 4829. The NGPA certainly does not *require* such a result; indeed, the NGPA does not even *support* such a result.

1. The Section 503(b) Determination Procedure Applies To Category Determinations. Section 503(b) of the NGPA (App. 95a-96a) sets forth the process by which the jurisdictional agency and the Commission determine the particular NGPA category for which particular gas qualifies. In general, three outcomes are possible. The Commission can *affirm* a jurisdictional agency determination by not acting on that determination within the prescribed time periods. This method of affirmance applies both to jurisdictional agency determinations that gas (1) does or (2) does not qualify for the particular category sought.

Second, the Commission can *remand* a determination, based on a finding that the determination "is not consistent with information contained in the public records of the Commission, and which is not part of the record upon which" the determination was made. 15 U.S.C. § 3413(b)(2)(A). Third, the Commission can *reverse* a determination, if it finds that the determination "is not supported by substantial evidence in the record upon

which" the jurisdictional agency made the determination. 15 U.S.C. § 3413(b)(1)(A). The Commission's authority to reverse or remand a determination is governed by strict time limits. Under either option, the Commission must make an appropriate preliminary finding within forty-five days after the date on which the Commission received notice of the determination; in addition, the Commission must make a final finding within one hundred and twenty days of the preliminary finding. 15 U.S.C. §§ 3413(b)(1)(B) and 3413(b)(2)(B).

Judicial review of *remand* and *reversal* orders is specifically controlled by subsection 503(b)(4), 15 U.S.C. § 3413(b)(4). That section provides that orders remanding and reversing jurisdictional agency determinations are subject to judicial review "in the United States Court of Appeals for any circuit in which such party is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit." The NGPA does not expressly provide for judicial review of Commission *affirmance* of jurisdictional agency determination.[10]

2. The Section 503(d) Reopening and Vacating Procedure Is Altogether Different Than The Section 503(b) Determination Procedure. Section 503(d) (App. 98a-99a) provides that final determinations, which have passed the Commission review stage, may be reopened and vacated only if (1) the Commission or the jurisdictional agency relied on an "untrue statement of a material fact," or (2) there was omitted "a statement of material fact necessary . . . to make the statements made not misleading. . . ." 15 U.S.C. § 3413(d). Section 503(d) provides further that "[a]ny untrue statement or omission of material fact to a Federal or state agency upon which the Com-

[10] The NGPA does not require the Commission to issue an order affirming a jurisdictional agency determination; if the Commission does not act within the prescribed time periods, the determination becomes final.

mission relied shall be deemed a statement or entry under Section 1001 of Title 18." [11]

3. Section 503(c)(4) Applies Only To Determinations Under 503(b), Not To Orders Reopening And Vacating Final Determinations Under Section 503(d). The Fifth Circuit has held that judicial review of Commission final determinations is limited by subsection 503(c)(4). *Mesa Petroleum Corporation* v. *FERC*, 688 F.2d 1014, 1016 (1982). That subsection, which appears under Section 503(c), "state authority," provides as follows: "(4) Judicial review.—Any such determination referred to in subsection (a)(1) of this section made in accordance with procedures described in paragraph (3) shall not be subject to judicial review under any Federal or State law except as provided under subsection (b) of this section." App. 98a. In turn, subsection (a)(1) sets forth the categories of gas to which the determination procedure applies (App. 94a); paragraph (c)(3) (provides that the jurisdictional agency shall make its determinations in accordance with its own producers. In *Mesa*, the Fifth Circuit held that Section 503(c)(4) precluded this Court from review of Commission affirmance of jurisdictional agency determinations. EPO does not challenge this holding.

However, viewed in the context of the organization of Section 503, subsection 503(c)(4) is clearly *inapplicable* to judicial review of Commission orders reopening and vacating final determinations under Section 503(d). The need for review by this Court is especially great, because the Fifth Circuit's interpretation of Section 503(c)(4) as prohibiting judicial review of Section 503(d) reopening orders is not only inconsistent with the wording of Section 503(c)(4), but undermines the NGPA's goal of promoting certainty in the determination process. *Pat-*

[11] As noted by the District of Columbia Circuit in *ANR*, this section imposes criminal penalties on anyone who knowingly and willfully provides a federal agency with false or misleading information.

terson v. *McClean Credit Union*, 57 U.S.L.W. 4705, (June 15, 1989) (affirming dismissal of private action under 42 U.S.C. § 1981 for employment discrimination based upon racial harassment). Section 503(c)(4) is merely intended to ensure that (1) only the Commission, not a Federal or state court, shall review jurisdictional agency determinations and (2) judicial review of Commission final determinations under Section 503(d) is limited to the circumstances set forth in Section 503(b)(4). The NGPA thus avoids multiple reviewing authorities imposing inconsistent standards. By contrast, Section 503(d) does not involve the determination that natural gas qualifies for a particular NGPA category, does not involve the jurisdictional agencies, contains no time limits for Commission action, and provides no formal procedures. Congress structured Section 503 to make Section 503(b) and Section 503(d) separate, independent provisions within the overall section. Congress would not have established separate sections for (1) making well category determinations and (2) reopening and vacating final determinations if it had intended for the two sections to be construed as indistinguishable.

In summary, subsection 503(c)(4) does not support, let alone compel, the Fifth Circuit's holding that it lacked jurisdiction to review the Commission's Reopening Order.

C. The Pertinent Legislative History Of The NGPA Supports An Assertion Of Jurisdiction.

The legislative history of Section 506(a)(4) and 503 of the NGPA indicates that the general judicial review provision (Section 506(a)(4)) is controlled by the specific review provision for determinations contained in Section 503(b). However, in the Reopening Order, the Commission did not act under Section 503(b). The Commission reopened the final Travis Peak well category determinations under Section 503(d), a distinct subsection with entirely different procedures and substantive standards.

The legislative history does not support the Fifth Circuit's holding that Congress intended to foreclose review of Commission orders reopening and vacating final determinations under Section 503(d).

The floor debates and the conference report concerning the NGPA do not expressly state that Commission reopening and vacating orders under Section 503(d) are subject to judicial review under Section 506. However, the legislative history under Section 506 *plainly and unmistakably* compels a finding that Section 506 was intended *only* to preclude judicial review of Commission Section 503(b) action *affirming* jurisdictional agency determinations. Section 506 was *not* intended to prevent judicial review of Section 503(d) orders. The Congress did not place, and did not intend to place, any such jurisdictional limitation on Commission orders under Section 503(d) reopening and vacating final determinations.

In his floor statement on the NGPA, Representative Dingell stated that the Section 506 does not apply to Section 503(b) determinations.

> Section 506(a)(1) does not now fully reflect the separate judicial review procedures established under Section 503. Section 506(a)(1) should have included a paranthetical [sic] exclusion (other than a final finding by the Commission under Section 503(b)(1), an order assessing a civil penalty under Section 504(b)(6), or an order under Section 302 or 308). . . . In particular, the judicial review requirements of Section 503(b) are intended to be distinct from the judicial review provisions set forth in Section 506.

124 Cong. Rec. H. 13119 (daily ed. October 14, 1978). Significantly, Congressman Dingell's remarks did *not* refer to Section 503(d) orders reopening and vacating final determinations. His statement cannot be understood to preclude judicial review of such orders.

In summary, the legislative history of the NGPA requires the conclusion that Section 506 grants the United States Courts of Appeals jurisdiction to review orders under Section 503(d) reopening and vacating final determinations.

PRAYER FOR RELIEF

WHEREFORE, this Court should grant the petition to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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89-1344
No. ____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ENSERCH EXPLORATION, INC., AS MANAGING GENERAL PARTNER OF EP OPERATING COMPANY,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-4066

ENSERCH EXPLORATION, INC., AS
MANAGING GENERAL PARTNER OF
EP OPERATING COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Oct. 30, 1989

Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Before CLARK, Chief Judge, BROWN and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

Enserch Exploration, Inc. petitions for review of the Commission's order remanding a tight formation designation to the Texas Railroad Commission and of the Commission's order reopening seventy-five individual tight formation well determinations. For the reasons cited herein, we affirm the remand order but dismiss the petition for review of the reopening order for lack of jurisdiction.

I. FACTS AND PROCEDURAL HISTORY

The Natural Gas Policy Act authorizes the Federal Energy Regulatory Commission (hereinafter Commission) to prescribe incentive prices for certain categories of natural gas that are produced under conditions which "present extraordinary risks or costs." 15 U.S.C. § 3317. Among those categories is gas produced from a tight formation.[1] A producer operating in a field that has been designated as a tight formation may be entitled to higher incentive prices for gas produced from that field.

Section 503 of the Natural Gas Policy Act (hereinafter NGPA) provides the contemporary statutory framework for the identification and designation of gas entitled to incentive pricing. A four step process is involved. First, the local regulatory authority[2] recommends that a field be designated as a tight formation. Second, the Commission may affirm, reverse, remand, issue a preliminary finding or simply take no action on the local authority's recommendation. If the Commission takes no action, the local authority's recommendation becomes final forty-five days after receipt of the recommendation by the Commission. If the Commission issues preliminary findings but fails to take further action, the local authority's recommendation becomes final one hundred twenty days after the date the Commission's preliminary finding was issued. In step three, an interested producer may petition the local regulatory authority to recommend that a particular well within the designated tight formation be classified as a tight formation well. If the local regulatory authority agrees, it recommends to the Commission

---

[1] A tight formation is a sedimentary layer of rock cemented together in such a manner so as to restrict or impede the flow of gas through the rock.

[2] Section 503 of the NGPA defines the local regulatory authority as the "[f]ederal or [s]tate agency having regulatory jurisdiction with respect to the production of natural gas." 15 U.S.C. § 3413 (c)(1).

that the particular well be classified as a tight formation well. Fourth, the Commission may affirm, reverse, remand, issue a preliminary finding, or simply take no action on the local authority's recommendation. As in step two, the local authority's individual tight formation well recommendation becomes final in forty-five days from the date the Commission receives the recommendation unless the Commission has issued a preliminary finding. In the event that the Commission has issued a preliminary finding, the Commission has one hundred twenty days from the date the preliminary finding was issued in which to take further action before the local authority's recommendation becomes final. *See Ecee, Inc. v. FERC*, 645 F.2d 339, 345-53 (5th Cir.1981) (discussing the statutory divisions of responsibilities between the Commission and the local regulatory authority).

The Commission is obligated to reverse the local regulatory authority's determination if "[the Commission] makes a finding that such determination is not supported by substantial evidence in the record upon which such determination was made." 15 U.S.C. § 3413(b)(1). Absent such a finding, the Commission may remand to the local regulatory authority if

> (A) the Commission finds that a State or Federal agency determination is not consistent with information contained in the public records of the Commission, and which is not part of the record upon which such determination was made; and
>
> (B) such preliminary finding and notice thereof . . . is made within 45 days after the date on which the Commission received notice of such determination . . . and the final such finding is made within 120 days after the date of the preliminary finding.

Id. § 3413(b)(2). Once final, the determination is binding unless:

(A) if in making such determination the Commission or such Federal or State agency relied on any untrue statement of a material fact; or

(B) if there was omitted a statement of material fact necessary in order to make the statements made not misleading, in light of the circumstance under which they were made, to the Federal or State agency in making such final determination or to the Commission in reviewing such determination.

Id. § 3413(d)(1).

Prior to *Williston Basin Interstate Pipeline Co. v. FERC*, 816 F.2d 777 (D.C. Cir.1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 748, 98 L.Ed.2d 761 (1988), the Commission conducted its review of local authority tight formation recommendations pursuant to § 501 of the NGPA rather than § 503. Under § 501, the Commission's review of a tight formation recommendation was made under the Commission's rule-making authority.[3] At the time the instant proceedings began, the Commission, operating under its § 501 rulemaking authority, received such a recommendation from the Texas Railroad

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[3] Section 501 authorizes the Commission to engage in any activity, up to and including the promulgation of rules, that it considers necessary to fulfill its obligations under the NGPA. 15 U.S.C. § 3411. Pursuant to this grant of rulemaking authority, the Commission deemed a local regulatory authority's designation of a tight field as a "recommendation." The Commission, after receiving such a recommendation, would publish a notice of proposed rulemaking in the Federal Register, review comments, institute a public hearing, and on the basis of all information gleaned therefrom, approve, deny or modify the jurisdictional agency's recommendation. In *Williston Basin Interstate Pipeline Co. v. FERC*, 816 F.2d 777, the D.C. Circuit held that the Commission must act exclusively within the confines of § 503 of the NGPA in reviewing all future tight formation recommendations. Thus, the Commission, after Williston Basin, was not free to employ its rulemaking authority in the designation of tight formations.

Commission regarding the Travis Peak Field.[4] Upon review of the data submitted by the Texas Railroad Commission in support of the Travis Peak recommendation, the Commission advised the Texas Railroad Commission that the data did not appear to satisfy the prescribed permeability and flow rate guidelines.[5] Thereafter, the Texas Railroad Commission tendered an amended recommendation. As with the first recommendation, the amended recommendation did not meet with the Commission's approval; informal meetings were therefore held in order to resolve the problem. Eventually, on May 23, 1986, the Commission issued Order No. 450 which designated most, but not all, of the Travis Peak Field as a tight formation.[6]

Less than a month later, on June 19, 1986, Delhi Gas Pipeline Corporation (hereinafter Delhi) filed a petition for rehearing of Order No. 450. In support thereof, Delhi argued that the data submitted to the Commission

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[4] The Travis Peak Field lies under several contiguous counties in northeast Texas.

[5] The Railroad Commission's findings were based on the geometric mean average whereas the Commission was accustomed to employing the arithmetic averaging method. *See generally*, S.A. Holditch, R.M. Robinson and W.S. Whitehead, "The Analysis of Complex Travis Peak Reservoirs in East Texas" SPE/DOE 16427 at 10-11.

[6] Order No. 450 finally became effective on June 23, 1986—some four and one half years after the Texas Railroad Commission's first recommendation to the Commission on November 2, 1981 that the Travis Peak Field qualify as a tight formation. After Order No. 450 was placed in effect, several Travis Peak operators filed applications with the Texas Railroad Commission to secure individual tight formation well determinations for certain Travis Peak wells already completed. The Texas Railroad Commission approved the individual well applications and forwarded its findings to the Commission. Because the Commission took no action to reverse or remand the individual tight well determinations of the Texas Railroad Commission with respect to the seventy-five wells at issue in the instant case, the determinations became final under § 503.

regarding the tight field qualities of the Travis Peak Field were unrepresentative of the Field and were outdated at the time of submission. In further support of its contentions, Delhi submitted two documents. One represented an analysis of fifty-three Travis Peak wells completed after 1980 that reportedly failed to meet tight formation standards. The other was a 1986 report conducted by the Gas Research Institute demonstrating that average permeability in the Travis Peak Field exceeded permissible levels.

Approximately six months after Delhi's June 19, 1986 petition for rehearing of Order No. 450, the Commission, on January 9, 1987, granted the petition for rehearing, vacated Order No. 450, and reopened the record. The parties to the reopened rulemaking proceeding held several prehearing conferences which addressed such topics as whether the seventy-five individual Travis Peak tight well determinations would be affected by the outcome of the hearing. Before that and other issues were resolved, however, the Commission cancelled the hearing as a result of the D.C. Circuit's decision in *Williston Basin Interstate Pipeline Co. v. FERC* with effectively stripped the Commission of its § 501 rulemaking authority.[7] After Williston was decided, the Commission, proceeding under § 503, could pursue five avenues with respect to the Texas Railroad Commission's recommendation that the Travis Peak Field qualify as a tight formation: the Commission could affirm, reverse, remand, issue a preliminary finding, or simply take no action on that recommendation.[8] Accordingly, the Commission issued a "no-

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[7] The Commission, responding to *Williston Basin*, issued on July 29, 1987, Order No. 479 which announced that the Commission would henceforth make tight formation determinations under § 503 rather than § 501. Order No. 479 became effective on August 20, 1987.

[8] After the *Williston Basin* mandate issued on July 15, 1987, the Commission was faced with the decision of whether to apply the

tice of preliminary finding" to remand the designation of the Travis Peak Field as a tight formation to the Texas Railroad Commission. *Texas Railroad Commission, Travis Peak Formation*, 40 FERC ¶ 61,100 (July 29, 1987).

In support of its decision to remand, the Commission noted that the information provided to it by Delhi was inconsistent with the Texas Railroad Commission's designation of the Travis Peak Field as a tight formation.[2]

Court's mandate prospectively or retrospectively. It decided that a prospective application was the better course. The significance of the Commission's decision in that regard is as follows. As a result of the Commission's January 9, 1987, vacation of Order No. 450, the Texas Railroad Commission's original tight formation designation of the Travis Peak Field which was dated November 2, 1981 was essentially resurrected as an outstanding recommendation. In other words, it was as if the Commission had never acted on that original Texas Railroad Commission designation. As mentioned earlier, *Williston Basin* compelled the Commission to operate under the provisions of § 503. If the Commission had applied the *Williston Basin* mandate *retrospectively*, it would have had to use November 2, 1981 as the operative date for § 503 purposes, and thus would have been unable to remand the Travis Peak tight formation designation to the Texas Railroad Commission since the 45 and 120 day deadlines of § 503(b)(2)(B) would have long since expired. By applying *Williston Basin prospectively*, however, the Commission could use the date that the *Williston Basin* mandate issued—July 15, 1987—as the operative date, thereby allowing the Commission sufficient time in which to issue a preliminary remand order which satisfied the 45 and 120 day deadlines of 503(b)(2)(B).

[2] The Commission seemed to recognize the protracted nature of the proceedings in the instant case. In an apparent attempt to reconcile the need to resolve the issue once and for all with the need to properly consider the newly submitted controversial data, the Commission stated:

> Tight formation recommendations have historically been expeditiously reviewed and for the most part approved by the Commission. However, in this case, the Commission had difficulty with the Travis Peak recommendation from the beginning. Delays were caused by various factors including review of the original recommendation and the conclusion that the recom-

Moreover, the Commission stressed that the new information provided by Delhi had not been a part of the record upon which the Texas Railroad Commission had made its original designation. *See* "Final Order Remanding Jurisdictional Agency Determination," *Texas Railroad Commission, Travis Peak Formation*, 41 FERC ¶ 61,213, 61,580-81 (1987) ("the data submitted by Delhi raise legitimate doubts as to whether Travis Peak qualifies as a tight formation under the applicable standards of the Commission's regulations"). Thereafter, the Commission, on November 25, 1987, issued an "Order Reopening Final Well Category Determinations." The Commission, relying on its reopening authority under § 503(d)(1)(A), concluded that the seventy-five individual tight field well determinations of the Texas Railroad Commission had rested on an "untrue statement of fact," namely, the Commission's *own* earlier designation of the Travis Peak Field as a tight formation.

On January 25, 1988, the Commission dismissed all requests for rehearing of the remand order. *Texas Railroad Commission, Travis Peak Formation*, 42 FERC ¶ 61,074 (1988). Likewise, on January 25, 1988, the Commission dismissed requests for rehearing of the "Order Reopening Final Well Category Determinations." *Id.* at ¶ 61,075. Thereafter, Enserch Exploration (hereinafter petitioner), petitioned this Court for review of the Commission's orders denying rehearing of the remand and reopening orders.

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mendation did not meet Commission guidelines, submittal of a revised proposal by Texas, meetings with Texas personnel concerning the revised recommendation, acquisition of the well code data from TXO, issuance of Order No. 450, vacation of Order No. 450, and issuance of the notice of preliminary determination.

"Final Order Remanding Jurisdictional Agency Determination," *Texas Railroad Commission, Travis Peak Formation*, 41 FERC ¶ 61,213 (1987).

II. DISCUSSION

There are two issues presented by the instant case. The first issue is whether the Commission acted arbitrarily and capriciously in remanding the Travis Peak Field tight formation determination to the Texas Railroad Commission. The second issue is whether the Commission exceeded its authority under the NGPA by reopening the seventy-five Travis Peak individual tight formation well determinations. For the following reasons, we affirm the Commission's remand to the Texas Railroad Commission of the Travis Peak tight formation recommendation. As to the second issue, we conclude that because the order reopening the seventy-five individual well determinations is not reviewable under the NGPA and governing precedential authority, this Court lacks jurisdiction to consider the merits of the petitioner's claims in that regard.

We review the Commission's order remanding the Travis Peak Field tight formation determination to the Texas Railroad Commission under a statutorily provided arbitrary and capricious standard. 15 U.S.C. § 3413(b)(4)(A). In that undertaking, we consider whether the action taken by the Commission was "based on a consideration of the relevant factors" and "whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); *Prager v. Hodel*, 793 F.2d 730, 733 (5th Cir.), *cert. denied*, 479 U.S. 98, 107 S.Ct. 581, 93 L.Ed.2d 584 (1986). *See also Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)) (courts are to pay deference to an agency's construction of a statute with which the agency is charged with administering unless that construction is arbitrary, capricious, or manifestly contrary to the statute. An agency determination is considered arbitrary and capricious if the agency has 1) "entirely failed to consider an important aspect of the problem," or 2) "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible

that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). It is in light of the foregoing standards that we review the Commission's remand order.

Section 503(b) of the NGPA gives the Commission the discretion to remand to the local regulatory authority any tight formation designation provided that 1) "the Commission finds that a State or Federal agency determination is not consistent with information contained in the public records of the Commission;" 2) that information "is not part of the record upon which such determination was made;" and 3) the Commission issues a preliminary remand order within forty-five days of the date it received notice of the determination and issues a final remand order within 120 days of the date of the preliminary order. 15 U.S.C. § 3413(b)(2). The petitioner in this case does not argue that the foregoing requirements (2) and (3) were not met. Rather, the petitioner contends that the Commission acted arbitrarily and capriciously in finding that Delhi's newly submitted information regarding the Travis Peak Field was inconsistent with the Texas Railroad Commission's determination that the Field was a tight formation. Accordingly, the scope of our review narrows to a consideration of whether the first requirement of section 503 as set forth above was met.

The nature of Delhi's newly supplied information belies the petitioner's contention that the Commission erred in concluding that the new information was inconsistent with the designation of Travis Peak Field as a tight formation. Contained in the new information were data which indicated that at least fifty-three wells produced in the Travis Peak formation after 1980 did not meet the Commission's tight formation standards. Additionally, as part of Delhi's new information, the Commission was given a 1986 report by the Gas Research Institute

which indicated that average permeability in the Travis Peak Field exceeded permissible levels. The Commission, while concluding that the new information was not sufficiently "dispositive" to warrant outright reversal of the Texas Railroad Commission's designation, determined that it was nevertheless sufficient to "raise legitimate doubts as to whether Travis Peak qualifies as a tight formation under the applicable standards of the Commission's regulations." 41 FERC at ¶ 61,580-81. In light of these facts, we conclude that the Commission, far from acting arbitrarily and capriciously in this matter, pursued a reasonable and prudent course of action in remanding the tight field designation to the Texas Railroad Commission.

The petitioner further contends that the Commission erred in remanding the Travis Peak designation because the Commission's consideration of Delhi's newly submitted evidence was untimely. The petitioner claims that such "hindsight" evidence does not support a remand. We disagree. In *Ecee, Inc. v. FERC*, 645 F.2d 339 (5th Cir.1981), this Court held that the Commission may consider "all relevant evidence" regardless of its age or method of preparation in deciding whether to exercise its section 503 remand authority. *Id.* at 351. Indeed, this Court held that where, as in the instant case, reversal is improper but the evidence in the Commission's files is inconsistent with the determination of a [local] jurisdictional agency, "it would probably be an abuse of discretion *not* to remand." *Id.* at 351 n. 9 (emphasis supplied).

Last, the petitioner argues that the Commission has "second guessed" the Texas Railroad Commission and "thwarted the will of Congress" by defeating producer expectations of incentive pricing. We are unpersuaded by either of these contentions. First, the Commission has not second guessed the Texas Railroad Commission. To the contrary, the Commission is providing the Texas Railroad Commission with the opportunity to reconsider, in

light of the newly discovered evidence, its earlier recommendation to the Commission that the Travis Peak Field be designated as a tight formation. Moreover, the Commission specifically accorded the Texas Railroad Commission the prerogative to decide on remand the proper method of calculating permeability and flow rates.

We likewise find unpersuasive the petitioner's contention that the Commission has ignored a congressional mandate by defeating producers' expectations of incentive pricing in the Travis Peak Field. In that regard, it is axiomatic that the Commission cannot ignore its responsibility under the NGPA to ensure that the "ladies at the burnertip" do not pay artificially inflated prices for gas that might not qualify for incentive prices. *See Perlman v. FERC*, 845 F.2d 529, 532 (5th Cir.1988); *Columbia Gas Development Corp. v. FERC*, 651 F.2d 1146, 1150 (5th Cir.1981). We agree with the Commission in the instant case that it has acted in furtherance of that congressional mandate by remanding to the Texas Railroad Commission a tight formation designation that is inconsistent with information in the Commission's files. Accordingly, we hold that the Commission did not act arbitrarily and capriciously in remanding to the Texas Railroad Commission the determination of the Travis Peak Field as a tight formation.

Last we turn to the petitioner's argument that the Commission's order reopening the seventy-five well category determinations in the Travis Peak Formation was unlawful, arbitrary, capricious and an abuse of discretion. Section 503(c)(4) of the NGPA provides that the Commission's NGPA related determinations, including determinations such as the one presented by the instant case, "shall not be subject to judicial review under any Federal or State law except as provided under subsection (b)" of this section. 15 U.S.C. § 3413(c)(4). Subsection (b), in turn, limits judicial review of the Commission's determinations to those cases in which the Commis-

sion either reverses the determination of a jurisdictional agency or remands the matter for further consideration. That provision notwithstanding, the petitioner contends that judicial review of the Commission's order reopening the individual well determinations is proper under section 506 of the NGPA. Section 506 is the NGPA provision which addresses, in a general manner, judicial review of the Commission's orders.

In *Mesa Petroleum Co. v. FERC*, 688 F.2d 1014, 1016 (5th Cir.1982), this Court concluded that it is "clear that the drafters of the [NGPA] intended to preclude our review of section 503 orders except in the limited instances prescribed in section 503(b)." Continuing further, the Court noted that "[w]e are invested with appellate jurisdiction of [jurisdictional agency determinations] *only* where the Commission reverse or remands them." *Id.* (emphasis supplied). In light of this authority, we are constrained to conclude that this Court lacks jurisdiction to review the Commission's order reopening the seventy-five Travis Peak individual tight formation well determinations.[10] Accordingly, the petition for review of the reopening order is dismissed.

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[10] As noted earlier, the Commission reopened the individual tight formation well determinations pursuant to § 503(d)(1)(A) concluding that those determinations were based on an "untrue statement of fact." The "untrue statement of fact" to which the Commission referred was its own earlier designation of the Travis Peak Field as a tight formation. That designation was relied on by the Texas Railroad Commission in making its recommendation that the individual wells in Travis Peak were tight formation wells. We are persuaded that Congress did not intend for the Commission to exercise its § 503(d)(1)(A) "untrue statement of a material fact" reopening authority in such a manner. If such were the case, every local regulatory authority decision with which the Commission disagreed would be automatically reviewable.

III. CONCLUSION

We conclude that the Commission did not act arbitrarily or capriciously in remanding the Travis Peak tight field designation to the Texas Railroad Commission in light of newly submitted evidence inconsistent with a tight field determination. With respect to the petition for review of the Commission's order reopening the seventy-five Travis Peak individual tight formation well determinations, we conclude that we are without jurisdiction to consider the merits of the petitioner's claims. Accordingly, the order of the Commission remanding the Travis Peak tight field designation to the Texas Railroad Commission for further consideration in light of the Commissions newly discovered evidence is affirmed. The petition for review of the Commission's order reopening the individual tight formation well determinations in the Travis Peak Field is dismissed for want of jurisdiction.

AFFIRMED IN PART. DISMISSED IN PART.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4066

FERC No. GP87-27-000

ENSERCH EXPLORATION, INC., AS MANAGING GENERAL PARTNER OF EP OPERATING COMPANY,
Petitioner,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for Review of Orders of the
Federal Energy Regulatory Commission

Before CLARK, Chief Judge, BROWN and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Enserch Exploration, Inc. for review of orders of the Federal Energy Regulatory Commission and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Commission remanding the Travis Peak tight field designation to the Texas Railroad Commission for further consideration in light of the Commission's newly discov-

ered evidence is affirmed, and the petition for review of the Commission's order reopening the individual tight formation well determinations in the Travis Peak Field is dismissed for want of jurisdiction, and the cause is remanded to the Commission for further proceedings in accordance with the opinion of this Court.

October 30, 1989

Issued As Mandate: Dec. 11, 1989

APPENDIX C

Federal Register—Vol. 51, No. 102

Wednesday, May 28, 1988—Rules and Regulations

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 271

[Docket No. RM79-76-090 (Texas-9 Addition II); Order No. 450]

High-Cost Gas Produced From Tight Formations; Texas Order Modifying and Adopting Jurisdictional Agency Recommendation

Issued May 23, 1988.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule; Order modifying and adopting recommendation.

SUMMARY: Under section 107(c)(5) of the Natural Gas Policy Act of 1978, the Federal Energy Regulatory Commission designates certain types of natural gas as high-cost gas. High-cost gas is produced under conditions which present extraordinary risks or costs and once designated may receive an incentive price. Under section 107(c)(5), the Commission issued a rule designating natural gas produced from tight formation as high-cost gas. Jurisdictional agencies may submit recommendations of areas for designation as tight formations. Here, the Federal Energy Regulatory Commission modifies and adopts the recommendation of the Railroad Commission of Texas that the Travis Peak Formation, located in Districts 5

and 6 of the State of Texas, be designated as a tight formation under § 271.703(d).

EFFECTIVE DATE: This rule is effective June 23, 1986.

FOR FURTHER INFORMATION CONTACT: Frederick W. Peters, (202) 357-9115; or Walter W. Lawson, (202) 357-8737.

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles C. Stalon, Charles A. Trabandt and C.M. Naeve.

On November 2, 1981, the Federal Energy Regulatory Commission (Commission) received a recommendation pursuant to § 271.702 of the Commission's regulations[1] from the Railroad Commission of Texas (Texas) that the Travis Peak Formation[2] underlying 47 counties in Districts 5 and 6 in the northeastern part of the State of Texas, be designated as a tight formation. The recommendation was proposed in a Notice of Proposed Rulemaking by the Director of the Office of Pipeline and Producer Regulation (Director), issued on December 15, 1981.[3] On January 22, 1982, Commission staff informed Texas by letter that the recommendation did not meet the Commission's guidelines for tight formation designation. On September 19, 1983, Texas submitted an

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[1] 18 CFR 271.703 (1985).

[2] The Travis Peak is the basal formation of the Lower Cretaceous series and is encountered immediately below the last limestone zone of the Silgo-Pettit Formation. It overlies the Jurassic Cotton Valley Group and is composed of lenticular, alternating sandstone and shale beds. Its thickness ranges from 500 to 2500 feet throughout the proposed area; the depth to the top of the formation varies from 3,140 feet to 10,850 feet.

[3] 46 FR 62086 (Dec. 22, 1981). Comments in support of the recommendation were filed by Mitchell Energy Corporation, Champlin Petroleum Company, and Husky Oil Company.

amended recommendation. An Amended Notice of Proposed Rulemaking was issued on November 14, 1983.[4]

Background

Under applicable NGPA regulations,[5] it is the Commission's policy to designate as a tight formation any formation recommended by a jurisdictional agency if the Commission finds that substantial evidence in the record shows that the average gas permeability, stabilized pre-stimulation natural gas flow rate, and the pre-stimulation oil flow rate of the formation do not exceed designated limits.

Texas' original recommendation was based on data from 606 gas wells. These data were obtained from operators and public record, but were listed by code number so that specific well identities and locations were not disclosed. Staff analysis revealed that the formation's average permeability and stabilized natural gas flow rate exceeded the permissible levels. With respect to the oil flow rate criterion, Texas' recommendation was not supported by any data. Texas simply noted that as of 1980 there were 183 active oil wells completed in the recommended area.

In its September 1983 amended recommendation, Texas continued to recommend that the entire Travis Peak Formation be designated as a tight formation. However, Texas suggested as an alternative that the top 200 feet of 45 specific gas wells be excluded from the recommended area, as well as all oil wells producing in the area. Texas' alternative recommendation contained no new data and

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[4] 48 FR 52482 (Nov. 18, 1983). Comments in support of the amended recommendation were filed by Champlin Petroleum Company and Crystal Oil Company. No party requested a hearing, and a hearing was not held.

[5] 18 CFR 271.703(c)(2)(i)(A)-(C) (1985). Incentive pricing under section 107(c)(5) of the NGPA is provided to encourage the exploration for and development of unconventional gas supplies.

continued to list all wells by code number.[6] Analysis of the alternative recommendation revealed that the formation's average permeability and stabilized natural gas flow rate still exceeded the permissible levels.

On December 13, 1983, Commission staff met with members of the Texas staff to discuss the Travis Peak recommendation. Commission staff learned that the application filed by Texas Oil and Gas Corporation (TXO) contained summary data and that all well identities were coded by TXO for proprietary reasons. Since it was not possible to determine the location of the data wells, neither Texas staff nor the Commission staff could properly analyze TXO's application. However, in order to facilitate Commission consideration of the recommendation, TXO provided Commission staff with additional permeability and flow rate data, referenced by code number, in 1985.

Review of the data submitted by TXO reveals that a large number of high permeability and high flow rate wells are located in two Panola County fields, the Bethany Field and the Carthage Field. Specifically, 31 of 44 data wells in the Bethany Field and 46 of 65 data wells in the Carthage Field exceed either the permeability or flow rate guidelines. These two fields thus represent "sweet spots" within an otherwise tight formation and are proposed to be excluded by Commission staff. Further analysis reveals that 31 other gas wells located throughout the recommended area have very high permeability values or

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[6] Texas also stated that average permeability should be based on a geometric mean rather than an arithmetic average. The issue of geometric v. arithmetic averaging was the subject of a public hearing before the Commission on November 12, 1982, in Docket No. RM79-76-089, *et al.* The geometric mean of a statistically diverse sample containing extremely high and low values will be lower than the arithmetic average of the same sample. The Commission has consistently required that a formation's average permeability be derived by arithmetically averaging representative permeability values.

high pre-stimulation flow rates and should be excluded to bring the remaining area within Commission guidelines.[7] Since there are still no specific flow rate data with respect to oil production, staff recommends that all oil wells be excluded from the recommended area.[8]

On December 6, 1985, Commission staff notified Texas of the proposed exclusions. Texas replied by letter of January 7, 1986, that the data analyzed by the Commission staff were never filed with or through Texas. Texas stated that it could not support any designation which would exclude any areas and/or wells from the area originally recommended.

Discussion

Under the tight formation program, as detailed in Order No. 99,[9] tight formation recommendations submitted to the Commission are approved under the Commission's rulemaking authority. The Commission is not limited by the evidence in the record presented to it by the jurisdictional agency and the various commenters, and accordingly is free to request or to develop any additional

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[7] The 31 gas wells are those wells among the remaining data wells which exceed either the permeability or flow rate guidelines by the greatest magnitude.

[8] Commission guidelines provide that the prestimulation oil flow rate of all wells in a tight formation may not exceed 5 barrels of oil per day. Texas' recommendation states that 96 percent of total production from the recommended area on a Btu basis is natural gas, twenty percent of the wells are oil wells, and 11 percent of the wells may produce as much as 5 barrels of oil per day. It is therefore reasonable to conclude that the flow rate of some oil wells may be within permissible levels. Based on the limited information available, however, excluding all oil wells from the recommended area ensures that the guidelines are met.

[9] Docket No. RM79-76, issued August 22, 1980, FERC Statutes and Regulations ¶ 30,183.

evidence which it deems necessary in order for it to issue a rule. Based on the supplemental information it has received and analyzed, the Commission finds that it is reasonable and necessary for it to modify Texas' recommendation.

The information submitted by TXO demonstrates that much of the Travis Peak Formation qualifies as a tight formation. Given the Commission's broad rulemaking authority, it would be unreasonable for the Commission to ignore the evidence which it has received simply because that evidence was never made available to Texas. Accordingly, Texas' recommendation must be modified to exclude (1) all oil wells (2) two gas fields in Panola County and (3) 31 other gas wells located throughout the recommended area. The exclusions are specifically described in the § 271.703 (d)(36)(v)(C). As discussed earlier, these exclusions result in an average permeability and natural gas flow rate throughout the remaining recommended area which are within the levels established under section 271.703(d). This action does not preclude Texas from requesting at a future date that some or all of the oil wells should be included in the designated area, if data are presented showing that the oil wells meet the Commission's guidelines.

The Commission Orders

Based on the discussion herein, the Commission adopts the recommendation of the Railroad Commission of Texas that a portion of the Travis Peak Formation, as modified by this order, be designated as a tight formation under section 271.703(d).

This amendment shall become effective June 23, 1986.

List of Subjects in 18 CFR Part 271

Natural gas, Incentive price, Tight formations.

In consideration of the foregoing, Part 271 of Subchapter H, Chapter I, Title 18, *Code of Federal Regulations*, is amended as set forth below.

By the Commission.

Kenneth F. Plumb,
Secretary.

PART 271—[AMENDED]

Section 271.703 is amended as follows:

1. The authority citation for Part 271 continues to read as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*; Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432; Administrative Procedure Act, 5 U.S.C. 553.

2. Section 271.703 is amended by adding paragraph (d)(36)(v) to read as follows:

§ 271.703 Tight formations.

* * * * *

(d) *Designated tight formations.*

* * * * *

(36) *Travis Peak Formation in Texas.* RM79-76 (Texas-9) and (Texas-9 Addition and Additions II, III, IV and VI).

* * * * *

(v) *Railroad Commission Districts 5 and 6.*—(A) *Delineation of formation.* The Travis Peak Formation is found in northeast Texas and includes all of Railroad Commission Districts 5 and 6 which contains 47 counties. A specified area of Panola County, 31 gas wells located throughout the formation, and all wells that have been designated as oil wells are excluded. These exclusions are described and listed in paragraph (d)(36)(v)(C) of this section.

(B) *Depth.* The top of the Travis Peak Formation is found at a depth of 3,140 feet in Lamar County in the

northern area of the east Texas basin and at 10,850 feet in the southern part of the basin in Cherokee County. The formation ranges in thickness from approximately 500 feet in the north to 2,500 feet in the south.

(C) *Areas not covered by the tight formation designation in Docket No. RM-79-76-090 (Texas-9 Addition II).*[1]

(1) The following natural gas wells:

Well name	Field	County
G.J. Huff #1	Cyril (TP 7650)	Rusk
Fields-Isaacs 2C	Waskom (TP)	Harrison
J.M. Furrh 1-T	Washom (TP-1)	Harrison
Carl Rockey 1	Cyril (TP 7650)	Rusk
Alford-Markey #1	Jarell Creek (TP)	Rusk
Wm. Witcher Gas Unit #1	E. Oak Hill (TP)	Rusk
H.A. Dunn B #1	Whelan (TP Prorated)	Harrison
C.A. Newsome Est 1-U	Freestone (TP)	Freestone
J.M. Harvard 1-C	Opelika (TP)	Henderson
Texie Young B #4	Tri-Cities (TP Lower)	Henderson
Ivy Williams Heirs 2T	N. Lansing (TP)	Harrison
Margaret Suggs #1	N. Lansing (TP)	Harrison
Bynum 2i	Henderson (Rusk Co. TP)	Rusk
D.J. Tucker A1T	Personville (TP)	Limestone
W.M. Taylor 1T	Joaguin (TP)	Shelby
Hinton 1	Willow Spring (TP)	Gregg
ILA White et al Unit 1T	Box Church (TP)	Limestone
Shiloh Gas Unit 10-1	Shiloh (TP)	Rusk
Lee Tipps Estate 1	Pone (TP Gas)	Rusk
Skipper Unit 1	Willow Springs (TP)	Gregg
Harry Hogue 1	Tri-Cities (TP Lower)	Henderson
J.W. Hanson 1B	Joaguin (TP)	Shelby
William H. Lane GU 3	Gooch (TP)	Harrison
F.C. Green 3	Woodlawn (TP-A)	Harrison
M.E. Sparkman 1	Minden (TP)	Rusk
Ester Brown Estate 1	S. Henderson (TP-A)	Rusk
O.L. Guy (TP Unit) 1	Joaguin (TP)	Shelby
Northern Gas Unit 1	Reed (TP)	Freestone
Birdwell 1	E. Minden (TP)	Rusk
Ruppe-Bosch 2	S.W. Whelan (TP, LO)	Harrison
J.R. Tutle 1	S.W. Woodlawn (TP)	Harrison

[1] The recommendation of Texas in Docket No. RM79-76-196 (Texas-9 Addition V), concerning the Pinehill, S.E. Field, is rendered moot because the Pinehill Field is included within the area designated as a tight formation by section 271.703(d)(36(v). Accordingly, Docket No. RM79-76-196 is terminated.

(2) Specifically, that area within these described boundaries: starting at the NE corner of Panola County south along the border of Texas and Louisiana to the south line of the J.N. Bowman survey, then west along the south line of the J.N. Bowman survey and the James Matthews survey to the west line of the James Matthews survey, then north along the west line of the James Matthews survey to the north line of the Wm. English Hrs. survey, then west along the north line of the Wm. English Hrs. survey to the west line of the Wm. English Hrs. survey, then south along the west line of the Wm. English Hrs. survey and the Wm. G. Anderson survey to the north line of the Willis Vaughn survey, then northwest to the west line of the Willis Vaughn survey, then south along the west line of the Willis Vaughn survey and the west line of the Adam Lagrone survey and the east line of the Barley Anderson survey to the north line of the Thomas Powdril survey, then east along the north line of the Thomas Powdril survey to the east line of the Thomas Powdril survey, then sougth along the east line of the Thomas Powdril survey to the north line of the Hampton Anderson survey, then southeast along the north line of the Hampton Anderson survey to the east line of the Hampton Anderson survey, then southwest along the east line of the Hampton Anderson survey to the south line of the Hampton Anderson survey, then northwest along the south line of the Hampton Anderson survey to the east line of the W.B. Hooker survey, then south along the east line of the W.B. Hooker survey to the south line of the W.B. Hooker survey, then west along the south line of the W.B. Hooker survey and the Julia Soape survey and the A.G. Hudson survey to the east line of the A.G. Hudson survey, then south along the east line of the A.G. Hudson survey to the south line of the A.G. Hudson survey, then west along the south line of the A.G. Hudson survey to the west line of the A.G. Hudson survey, then north along the west line of the A.G. Hudson survey to the north line of the L.A.

Choate survey, then west along the north line of the L.A. Choate survey to the east line of the I. Moore survey, then north aong the east line of the I. Moore, J.J. Soape and A. Smith surveys to the north line of the A. Smith survey, then west along the north line of the A. Smith survey to the east line of the Wiet Anderson survey, then north along the east line of the Wiet Anderson survey to the north line of the Wiet Anderson survey, then west along the north line of the Wiet Anderson survey to the west line of the Wiet Anderson survey, then south along the west line of the Wiet Anderson survey to the north line of the Mathew Payne survey, then west along the north line of the Mathew Payne survey, the L. Shield survey and the Sabella Hanks survey to the west line of the G.N. Graves survey, then north along the west line of the G.N. Graves survey and the A. Moorman survey to the north line of the M. Smith survey, then west along the north line of the M. Smith survey to the west line of the J.A. Powers survey, then north along the west line of the J.A. Powers survey to the north line of the J.A. Powers survey, then east along the north line of the J.A. Powers survey to the west line of the Sam Duncan survey, then north along the west line of the Sam Duncan survey to the south line of the David Blankenship survey, then west along the south line of the David Blankenship survey to the west line of the David Blankenship survey, then north along the west line of the David Blankenship survey to the north line of the David Blankenship survey, then east along the north line of the David Blankenship survey to the east line of the David Blankenship survey, then south along the east line of the David Blankenship survey to the south line of the L. Bowker survey, then northeast along the south line of the L. Bowker survey and the Wm. McFadden survey to the west line of the Antwine Duboise, Sr. survey, then northwest along the west line of the Antwine Duboise, Sr. survey and the Antwine Duboise, Jr. survey to the north line of the Antwine Duboise, Jr. survey,

then northeast along the north line of the Antwine Duboise Jr. survey and the south line of the Medom Yates survey to the east line of the Medon Yates survey, then northwest along the east line of the Medon Yates survey to the north line of the Medon Yates survey, then northeast along the north line of the TCRR Co. survey to the west line of T.T. Williamson survey, then north along the west line of the T.T. Williamson survey to the north line of the T.T. Williamson survey, then east along the north line of the T.T. Williamson survey to the west line of the Felix G. Timmin survey, then northeast along the west line of the Felix G. Timmin survey to the Panola County line, then east along the Panola County north line to the Texas and Louisiana border.

(3) All wells that have been designated as oil wells.

* * * *

[FR Doc. 86-11886 Filed 5-27-86; 8:45 a.m.]

APPENDIX D

Federal Register—Vol. 52, No. 14
Thursday, January 22, 1987—Rules and Regulations

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 271

[Docket No. RM79-76-250 (Texas-9 Addition II);
Order No. 450]

High-Cost Gas Produced From Tight Formations; Order Granting Rehearing, Vacating Order No. 450 and Establishing Procedures

Issued: January 9, 1987.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order granting rehearing, vacating Order No. 450 and establishing procedures.

SUMMARY: Under section 107(c)(5) of the Natural Gas Policy Act of 1978, the Federal Energy Regulatory Commission designates certain types of natural gas as high-cost gas. High-cost gas is produced under conditions which present extraordinary risks or costs and once designated may receive an incentive price. Under section 107(c)(5), the Commission issued a rule designating natural gas produced from tight formations as high-cost gas. Jurisdictional agencies may submit recommendations of areas for designation as tight formations. Here, the Federal Energy Regulatory Commission grants the rehearing requested filed by Delhi Gas Pipeline Corporation on June 19, 1986, vacates Order No. 450 and establishes proce-

dures for a hearing to consider additional evidence and arguments offered by persons permitted to intervene in this proceeding. The recommendation of the Railroad Commission of Texas that the Travis Peak Formation, located in Districts 5 and 6 of the State of Texas, be designated as a tight formation under § 271.703(d), will then be reconsidered by the Commission.

EFFECTIVE DATE: This order is effective January 9, 1987.

FOR FURTHER INFORMATION CONTACT: Roland Frye, (202) 357-8815; Walter W. Lawson, (202) 357-8737.

Order Granting Rehearing, Vacating Order No. 450 and Establishing Procedures

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve; Docket No. RM79-76-250.

Issued: January 9, 1987.

On November 2, 1981, the Federal Energy Regulatory Commission (Commission) received a recommendation from the Railroad Commission of Texas (Texas) that the Travis Peak Foundation (Travis Peak) be designated as a tight formation.[1] Travis Peak underlies 47 counties in Northeastern Texas. The Commission issued a notice of Texas' recommendation on December 15, 1981.[2] The Texas recommendation included coded well locations for proprietary purposes, but nevertheless specified their permeability and flow rates. By letter dated January 22, 1982, Commission staff informed Texas that

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[1] 18 CFR 271.703(c)(2)(i) (1986); *see also* 15 U.S.C. 3317(c) (1986) (to encourage exploration for high-cost natural gas. Congress in the Natural Gas Policy Act of 1978 (NGPA) provided authority to the Commission to establish incentive prices for certain classification of high-cost gas).

[2] 46 FR 62086 (December 22, 1981).

the data submitted in support of the recommendation did not satisfy the permeability and flow rate requirements set forth in the Commission's regulations.[3] On September 19, 1983, Texas submitted an amended recommendation. The Commission issued a notice of the amended recommendation on November 14, 1983.[4] In its amended recommendation, Texas continued to request that the entire Travis Peak be designated as a tight formation. However, Texas suggested as an alternative that the top 200 feet of the formation penetrated by 45 specific gas wells be excluded from the recommended area, as well as all oil wells producing in the area. Texas' amended recommendation contained no new data and continued to list all wells by code number for propiretary reasons.[5] Review of the amended recommendation revealed that the formation's average permeability and stabilized natural gas flow rate still exceeded the permissible levels.

On December 13, 1983, the Commission staff met with the Texas staff in an effort to resolve problems with the amended recommendation. Because Texas' original and amended recommendation did not show well locations within Travis Peak for proprietry reasons, the Commission staff could not determine whether the non-qualifying wells were scattered throughout Travis Peak or were concentrated in certain fields or areas of close proximity. If the non-qualifying wells were scattered throughout Travis Peak, then Texas' amended recommendation

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[3] 18 CFR 271.703(c)(2).

[4] 48 FR 52482 (Nov. 18, 1983). Champlin Petroleum Company and Crystal Oil Company filed comments in support of the amended recommendation. No party requested a hearing and the Commission held no hearing.

[5] Texas also stated that the average permeability should be based on a geometric mean rather than an arithmetic average. However, the Commission has consistently calculated formations average permeability by arithmetically averaging representative permeability values, and Texas has presented no reasons for changing this established practice.

would have to be denied. Such a wide dispersion of high permeability or high flow rate wells would not enable the Commission staff to carve out non-qualifying areas. Moreover, such a scattered dispersion would tend to indicate that the formation should not be designated as a tight formation. On the other hand, if the non-qualifying wells were in close proximity and confined to a identifiable field or area, the Commission could exclude that area of the recommendation so that the remaining portion could qualify as a tight formation.

To facilitate Commission consideration of Texas' amended recommendation, Texas Oil and Gas (TXO) provided the proprietary date necessary to identify the location of wells in Travis Peak.[5] Review of the data submitted by TXO revealed that a large number of high permeability and high flow rate wells are located in the Bethany field and the Carthage field, both located in Panola County. Specifically, 31 of 44 wells in the Bethany field and 46 of the 65 wells in the Carthage field exceed the permeability and or flow rate guidelines. These two fields thus represent "sweet spots" within the area recommended by Texas as a tight formation. Further analysis revealed that 31 additional gas wells have very high permeability values or high pre-stimulated flow rates and, only if these wells were excluded, could the remaining area be considered to possibly fall within Commission guidelines.

On December 6, 1985, Commission staff notified Texas that it proposed to exclude the above-identified sweet spots and wells from the recommended area. Texas replied by letter dated January 7, 1986, that the proprie-

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[5] In a May 22, 1986 letter to the Commission, TXO stated that the proprietary data was coded by Core Laboratories Inc., which assured TXO by letter dated January 5, 1981, that the data would remain confidential. TXO's letter also stated that TXO coordinated the industry effort to arrange for and finance the Core Laboratories study.

tary data supplied by TXO and analyzed by the Commission staff was never filed with Texas. Texas refused to support any designation which would exclude any areas and or wells from the area originally recommended.

Based on the data submitted by TXO, the Commission on May 23, 1986, issued Order No. 450 [7] which modified and adopted the recommendation of Texas that Travis Peak be designated as a tight formation under section 107(c)(5) of the NGPA, but excluded the sweet spots from the designation. On June 19, 1986, Delhi Gas Pipeline Corporation (Delhi) [8] filed an application for rehearing. The Commission on July 21, 1986, granted rehearing for the purpose of further consideration.

On October 6, 1986, Delhi filed supplemental information to its application for rehearing and requested reopening of the record for the purpose of receiving additional evidence. The supplemental information consisted of a preliminary analysis by Delhi of certain post-1980 Travis Peak completions in addition to recent data published by the Gas Research Institute on the Travis Peak formation. Delhi complained that the Texas recommendation, which was modified and adopted by the Commission, contained only stale information limited to fewer than half of the wells drilled into the formation. The data in the studies submitted by Delhi suggest that the average permeability and flow rates in Travis Peak may exceed the maximum permissible level for the formation to qualify as a tight formation under the Commission's regulations.[9]

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[7] Docket No. RM79-76-090, 51 FR 19164 (May 28, 1986), III FERC Stats. & Regs. ¶ 30,698.

[8] Delhi is a subsidiary of TXO.

[9] 18 CFR 271.703(c)(2) (1986) (the Commission's regulations provide that a formation may be designated as a tight formation if the recommended areas estimated average in situ permeability does not exceed 0.1 millidarcy).

On November 10, 1986, Texas Crude Inc. (Texas Crude) filed an answer to Delhi's petition to supplement its rehearing application. Among other claims, Texas Crude argues that Delhi has no right to supplement the record, that Order No. 450 is supported by substantial evidence in the record, and that Delhi's data is not reliable. Consequently, Texas Crude requests that Delhi's petition to supplement the record be dismissed.

The Commissions regulations provide that tight formations will be approved provided that the recommendation meets, among other things, the following guidelines:

(A) The estimated average in situ gas permeability, throughout the pay section, is expected to be 0.1 millidarcy or less.

(B) The stabilized production rate, against atmospheric pressure, of wells completed for production in the formation, without stimulation, is not expected to exceed (certain specified) production rate[s] . . . .

(C) No well drilled into the recommended tight formation is expected to produce, without stimulation, more than five barrels of crude oil per day.[10]

The Texas recommendation, as modified by the Commission, appeared to satisfy the above guidelines. Consequently, we issued Order No. 450 based on the information available at that time. As previously noted, Delhi has filed supplemental information and requested an opportunity to submit additional evidence which it alleges will prove that the Travis Peak is not a tight formation.

The Commission believes that Delhi's supplemental information and additional evidence are relevant and probative on the issue of whether Travis Peak should be designated a tight formation.[11] In addition, we note that

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[10] 18 CFR 271.703(c)(2)(i)(A) through (C) (1986).

[11] *See* Order Remanding Jurisdictional Agency Recommendation for Tight Formation Designation (Montana 1), 23 FERC ¶ 61,047

the Commission's decision in Order No. 450 required deletion of certain areas because of permeability and flow rates in excess of those permitted. The allegations made by Delhi, if proven, would mean that permeability and flow rates in excess of those permitted are even more widespread in the Travis Peak. Accordingly, Delhi's request for rehearing will be granted.

Delhi's request to reopen the record in this proceeding for the purpose of permitting supplementation with additional data is also granted. The Commission believes that review of Delhi's supplemental data, as well as other information which may be submitted, is in the public interest in order to assure that full and fair consideration can be given to all relevant evidence in this matter so that existing disputes as to material facts may be resolved. The Commission encourages any person having an interest which may be affected by the outcome of this proceeding to file a motion to intervene pursuant to Commission Rule 214.[12] All timely unopposed motions to intervene will be granted.[13] The Secretary will be instructed to issue a Notice of Formal Hearing, to be published in the Federal Register. The notice will describe the factual and procedural history of this proceeding, the issue presented, and the procedural requirements to be followed by persons seeking to intervene. The Commission also instructs the Chief Administrative Law Judge to designate a presiding administrative law judge to conduct the formal hearing on an expedited basis. The presiding administrative law judge should allow each party the maximum degree of participation permitted under the Commission's

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at 61,117 (1983) wherein the Commission stated that it "is not limited by the evidence in the record presented to it by the jurisdictional agency and the various commenters and accordingly is free to request or to develope any additional evidence which it deems necessary in order for it to issue a rule in a tight formation designation proceeding."

[12] 18 CFR 385.214 (1986).

[13] 18 CFR 385.214(a) (1986).

procedural regulations in order to bring out all relevant information regarding the character of the Travis Peak formation. Specifically, the Commission intends that the presiding administrative law judge allow each party to submit whatever permeability and production data it believes supports its position on the issue of the qualification of Travis Peak as a tight formation.[14] The presiding administrative law judge should also allow all parties to respond to each others' positions and supporting data.

In setting the matter for formal hearing, the Commission emphasizes that it is the unique circumstances of this case which warrant such procedures. This matter has been pending since November 1981. Issues of material fact which form the very basis of this determination are still in dispute. Given our conclusion that still further proceedings are necessary and given that the affected producers have already waited over five years for a Commission ruling on Texas' recommendation, we believe that the long pendency of this case justifies the procedures adopted in this order. However, the Commission considers the procedural approach adopted here to be limited to the facts of this case and not to constitute precedent for setting future tight formation rulemaking proceedings for a hearing before an administrative law judge.

We also vacate Order No. 450.[15] In this connection, the Commission notes that Texas' recommendation in Docket No. RM79-76-196 (Texas-9 Addition V) was terminated as moot because the Pinehill Field was included in the area designated by Order No. 450. In view of our action herein, the status of Texas' recommendation concerning the Pinehill Field will be addressed after completion of Commission action herein.

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[14] *See* 18 CFR 271.703(c)(2) (1986).

[15] The Commission is aware that a number of travis Peak well determinations have become final under 18 CFR 275.202(a) (1986). Those well determinations will be addressed in a separate order.

The Commission Orders:

(A) Delhi's application for rehearing is granted and the record in this proceeding is reopened.

(B) Pursuant to the authority under the Natural Gas Policy Act of 1978 and Commission's rules and regulations, a public hearing shall be held concerning whether in light of additional evidence to be submitted by interested parties Travis Peak should be designated as a tight formation.

(C) The Secretary of the Commission shall issue a Notice of Formal Hearing, describing the history and issue in this proceeding and the applicable procedures for intervention.

(D) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose (18 CFR 375.304), shall convene a prehearing conference in this proceeding to be held in a hearing room of the Federal Energy Regulatory Commission 825 North Capitol Street, NE., Washington, DC 20426. The presiding judge is authorized to establish any procedural dates necessary for the hearing and is also authorized to conduct further proceedings in accordance with this order and the Commission's Rules of Practice and Procedure.

(E) The preciding judge shall entertain motions to intervene by any interested person and permit the filing of comments on Delhi's evidence as well as the filing of any other relevant evidence.

(F) Order No. 450 is hereby vacated and accordingly in consideration of the foregoing, Part 271 of Subchapter H, Chapter I, Title 18, *Code of Federal Regulations*, is amended as set forth below.

List of Subjects in 18 CFR Part 271

Natural gas, Incentive price, Tight formations.

By the Commission. Commissioner Trabandt concurred with a separate statement attached.

Lois D. Cashell,
Acting Secretary.

PART 271—[AMENDED]

1. The authority citation for Part 271 continues to read as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*; Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432; Administrative Procedure Act, 5 U.S.C. 553.

§ 271.703 [Amended]

2. Section 271.703 is amended by removing paragraph (d)(36)(v).

Issued: January 9, 1987.

Concurring Opinion of Commissioner Charles A. Trabandt

I concur in this Order with several reservations, which I trust will be addressed in the remand of this case and subsequent action by the Commission in this docket. First, I could not support an action here, which as a matter of procedure had the probable or unavoidable substantive result of favoring one party, Delhi, in the ultimate disposition of the designation of the tight formation. Delhi is an affiliate of TXO, the original applicant for the tight formation designation that was recommended by the Railroad Commission of Texas. Delhi, despite that affiliation with the original applicant, now has urged on rehearing that the determination be reversed, and it provided supplemental information which has persuaded the Commission to vacate our previous Order No. 450 and remand the case to a FERC public hearing before a FERC ALJ. In effect, it would appear that the original corporate pro-

ponents of a tight formation designation have reversed position as a result of intervening events and changed circumstances since the original application. Consequently, it is not completely clear how the further proceedings in this Commission will unfold as to the proponents, including possibly the Railroad Commission and TXO, and opponents now, including Delhi, of the original designation and the respective procedural burdens under FERC regulations in a new and unprecedented FERC formal hearing. Thus, our action here is vacating Order No. 450 and remanding to a FERC proceeding raises serious concerns about the potential impact of our action on the substantive result in this case.

The action of the Commission here to remand a tight formation determination to a FERC proceeding before a FERC ALJ is unprecedented. In the past, we have remanded such cases, in our discretion, on two occasions to the jurisdictional agency of the individual state for further proceedings in light of inconclusive or additional information.[1] In this case, the Railroad Commission of Texas in a letter of November 25, 1986, signed by the three Commissioners urged us to deny Delhi's request for rehearing of Order No. 450. This Commission on the basis of that letter has concluded that a remand to the Railroad Commission is not appropriate and a formal FERC proceeding would be preferable. The Commission's conclusion here could establish the unfortunate precedent and practice that controversial decisions involving over a thousand wells, several hundred producers and

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[1] Docket No. RM79-76-098 (Montana-1), issued April 7, 1983, 23 FERC ¶ 61,047; Docket No. RM79-76-107 (Kansas-1), issued May 22, 1985, 31 FERC ¶ 61,210. *See, also,* Docket Nos. RM79-76-136 (Utah-5) and RM79-76-137 (Utah-5), issued September 27, 1985, 32 FERC ¶ 61,430, where the State of Utah's Board of Oil, Gas and Mining held additional public hearings in Utah in response to Commission staff recommendations to consider additional comments and data in support of and against the proposed tight formation designation.

millions of dollars, such as this case, could be avoided by state jurisdictional agencies and removed *de facto* to this Commission by their submission to the Commission of a similar letter. This unprecedented use of a formal FERC proceeding, rather than remand to the Railroad Commission, for a tight formation case, in part, adds to several concerns about the procedural and substantive impact on the Texas parties in this case.

In brief, those concerns include the nature of the issues on remand. For example, will the hearing focus more narrowly on the supplemental information submitted by Delhi or will the proceedings address any issues relevant to the tight formation designation? Should the proceedings be scheduled in Texas, to minimize expense and travel difficulties for all intersted parties, including those supporting the designation under Order No. 450, now vacated? Would the proceedings utilize the FERC formal evidentiary rules and procedures or any additional informality which may exist under applicable rules and practice of the Railroad Commission? Will all interested parties be allowed to participate on a formal or informal basis to the same extent they would have been able to do so under applicable Railroad Commission procedures? Will formal intervnor status be available and/or required for all interested parties? Will Texas parties be required as a practical matter to retain new Washington, DC counsel for the remanded FERC proceedings and advance a whole new substantive case under FERC rules and practices (because we vacted Order No. 450), with the potential result that the cost-prohibitive impact of such a requirement leads to severely constrained representation or even withdrawal of any interested parties? Will the unprecedented nature of the remanded proceedings here, rather than at the Railroad Commission, lead to a series of new procedural issues of first impression and interlocutory appeals before the Commission? What will be the financial impact of any significant additional delay on various parties should the FERC proceeding become en-

tangled in such procedural issues on remand and in subsequent Commission action? Is the Commission as a result being unavoidably drawn into a highly controversial case with potential negative procedural, and even substantive, impact on Texas parties supporting the designation as a tight formation?

I am encouraged that the Order has been modified as a result of our deliberations at the December 17, 1986, Commission meeting to attempt to address certain of these concerns. The Order at pages 7 and 8 now encourages formal intervention by any interested person in the proceeding instructs the Secretary to issue a formal notice of the proceedings published in the Federal Register, and provides guidance to the ALJ to allow, to the extent FERC procedural regulations would provide, maximum participation by parties, including submission of any permeability and production data and response to other parties, in order to obtain all relevant information regarding the Travis Peak Formation. The Order also now expressly states at page 8 that this action does not constitute a precedent for handling future tight formation rulemaking cases. I would have preferred that the Order additionally specify that the hearing be held in Austin, Texas, as the most appropriate way to develop the further record in this proceeding, since the jurisdictional agency proceedings have been and would normally be held there. I also would have preferred stronger guidance to the ALJ to parallel wherever possible under applicable FERC regulations the procedures and practices that otherwise would have obtained in a remanded proceeding at the Railroad Commission. We would provide better assurance of maximum access and opportunity for the full participation and information of all interested parties located in Texas.

These concerns will require final resolution as we proceed in this case. I have concurred in this Order in the anticipation that the Commission will be able to fashion

a fair and balanced procedural approach in resolving these issues.

Charles A. Trabandt,
Commissioner.

[FR Doc. 87-987 Filed 1-21-87; 8:45 am]

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse, Chairman;
Anthony G. Sousa,
Charles G. Stalon,
Charles A. Trabandt and
C. M. Naeve.

Docket No. GP87-27-000
(Formerly RM79-76-250)

TEXAS RAILROAD COMMISSION,
TRAVIS PEAK FORMATION
JD87-16493T

NOTICE OF PRELIMINARY FINDING AND ORDER TERMINATING HEARING

(Issued July 29, 1987)

INTRODUCTION

Under section 107(c)(5) of the Natural Gas Policy Act of 1978 (NGPA), the Federal Energy Regulatory Commission (Commission) designates certain types of natural gas as high-cost gas.[1] High-cost gas is produced under conditions which present extraordinary risks or

[1] 15 U.S.C. § 3317(c)(5) (1986).

costs, and once designated may receive an incentive price. The Commission issued a rule establishing that natural gas produced from tight formations is high-cost natural gas under NGPA section 107(c)(5).[2] Under the Commission's rule, jurisdictional agencies may submit recommendations of areas for designation as tight formations for Commission approval. In the instant case, the Texas Railroad Commission (Texas) recommended designation of the Travis Peak formation (Travis Peak) as a tight formation. For the reasons stated below the Commission is issuing this notice of preliminary findings under NGPA section 503(b)(2) that the determination by Texas that Travis Peak qualifies as a tight formation is not consistent with information contained in the public records of the Commission and therefore should be remanded to Texas for such further action as it deems appropriate. The Commission's preliminary findings under section 503 is made in light of the recent decision of the United States Court of Appeals for the District of Columbia Circuit *Williston Basin Interstate Pipeline Co. v. FERC*, 816 F.2d 777 (D.C. Cir. 1987) (*Williston Basin*) which held that the Commission in reviewing jurisdictional agency tight formation recommendations must treat them as determinations under NGPA section 503, rather than recommendations for rulemaking under NGPA section 501 as the Commission has done in the past.

BACKGROUND

On November 2, 1981, the Commission received a recommendation from Texas that Travis Peak be designated a tight formation pursuant to section 271.703(c)(2)(i) of the Commission's regulations.[3] Travis Peak underlies

[2] Order No. 99, Regulations Covering High-Cost Natural Gas Produced From Tight Formations, 45 Fed. Reg. 56,034 (Aug. 22, 1980), FERC Stats. and Regs. [Regulations Preambles 1977-1981] ¶ 30,183 (1980); 18 C.F.R. § 271.703 (1987).

[3] 18 C.F.R. § 271.703(c)(2)(i) (1986).

47 counties in northeastern Texas. After reviewing the record and supplemental material the Commission on May 23, 1986, issued Order No. 450[4] that modified and adopted Texas' recommendation that Travis Peak be designated a tight formation under NGPA section 107(c)(5) but excluded certain "sweet spots" from the designation.[5]

On June 19, 1986, Delhi Gas Pipeline Corporation (Delhi) filed an application for rehearing which was later supplemented on October 6, 1986, complaining that Texas' recommendation contained stale information which was limited to fewer than half of the wells drilled into the formation. The data submitted by Delhi suggest that the average permeability and flow rates in Travis Peak may exceed the maximum permissible level for the formation to qualify as a tight formation under the Commission's regulations.[6] The Commission concluded that Delhi's supplemental information raised legitimate doubts as to whether Travis Peak should be designated a tight formation. On January 9, 1987, the Commission granted Delhi's request for rehearing, vacated Order No. 450, reopened the record, and initiated a formal hearing to determine whether, in light of additional evidence presented by Delhi and other interested parties, Travis Peak meets the Commission's standards for designation as a tight formation.[7]

DISCUSSION

The Commission used section 501 rulemaking procedures for evaluating jurisdictional agency recommenda-

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[4] Docket No. RM79-76-090, 51 Fed. Reg. 19,164 (May 28, 1986), FERC Stats. & Regs. ¶ 30,698.

[5] The sweet spots excluded in Order No. 450 were the Bethany and the Carthage fields in Panola County. Also excluded were 31 additional gas wells which had high permeability values.

[6] 18 CFR § 271.703(c)(2) (1986).

[7] Docket No. RM79-76-250, 52 Fed. Reg. 2,401 (Jan. 22, 1987), FERC Stats. & Regs. ¶ 30,724.

tions up until the recent *Williston Basin* decision. In implementing its authority under section 107(c)(5) of the NGPA, the Commission issued Order Nos. 99 and 99-A establishing incentive pricing for natural gas produced from designated tight formations. Section 271.703(c) of the Commission's regulations provides that, upon written recommendation by a jurisdictional agency, the Commission may approve a recommendation that a natural gas formation be designated as a tight formation if it meets the following guidelines:

(A) The estimated average in situ gas permeability, throughout the pay section, is expected to be 0.1 millidarcy or less.

(B) The stabilized production rate, against atmospheric pressure, of wells completed for production in the formation, without stimulation, is not expected to exceed [certain specified] production rate[s]. . . .

(C) No well drilled into the recommended tight formation is expected to produce, without stimulation, more than five barrels of crude oil per day.

Pursuant to section 271.703(c) of the regulations, the Commission has reviewed tight formation recommendations received from jurisdictional agencies under its general rulemaking authority in section 501 of the NGPA, which authorizes the Commission to perform any and all acts and to prescribe, issue, amend and rescind such rules and orders as it may find necessary. The section 501 rulemaking procedure is subject to judicial review under sections 502 and 506 of the NGPA.

The court in *Williston Basin*, contrary to the Commission's past practice, held that the Commission, in passing on local jurisdictional agencies' recommendations for tight formation designations, was actually reviewing determinations under NGPA section 503. Under section 503, the Commission's orders and thus the determinations were

not judicially reviewable when the Commission adopts the jurisdictional agency's view. As a result of *Williston Basin* the Commission must reevaluate the appropriate treatment of the seven tight formation recommendations which are currently pending before it.[8]

In Travis Peak, which was in hearing when the court issued its opinion in *Williston Basin*, the Commission originally approved the jurisdictional agency's determination in Order No. 450. As noted above, however, supplemental information submitted by Delhi which contradicted this finding caused the Commission to vacate Order No. 450, grant Delhi's request for rehearing, and establish procedures for determining the character of the formation. Since the Commission's order granting rehearing, interested parties have submitted copious information both challenging and supporting designation of Travis Peak as a tight formation. Section 503 of the NGPA[9] establishes a procedure whereby state and federal agencies with jurisdiction with respect to the production of natural gas determine whether natural gas qualifies

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[8] Concurrently with this order, the Commission is issuing a final rule in Docket No. RM87-31-000 regarding procedures for determining high-cost natural gas produced from tight formations eligible for incentive prices pursuant to section 107(c)(5) of the NGPA. The rule will, among other things, incorporate tight formation designations under NGPA section 503 regulations rather than section 501 under Title 18 of the Code of Federal Regulations. The Commission is also issuing a notice of preliminary findings in Docket Nos. JD87-16490T, JD87-16489T, JD87-16488T, JD87-16481T, and JD-87-16492T reversing the jurisdictional agency tight formation recommendations as not supported by substantial evidence in the records, pursuant to NGPA section 503 and section 275.202 of the Commission's regulations. In addition, the Commission is issuing an order permitting a jurisdictional agency determination of tight formation to become final in Docket No. RM79-76101 (Colorado 23). This order specifically approves the jurisdictional agency's recommendation that the subject areas be designated as tight formations.

[9] 15 U.S.C. § 3413 (1982).

under various NGPA price categories upon application. Once a jurisdictional agency notifies the Commission of its determination, such determination becomes final by operation of law within 45 days unless it is reversed or remanded by the Commission during that period. Section 503(b) sets the standards for Commission review of these determinations and states, in pertinent part, that if, "the Commission finds that a state or federal agency determination is not consistent with information contained in the public records of the Commission, and which is not part of the record upon which such determination was made, . . . it may remand the matter to such state or federal agency for consideration of such information. If such agency, after consideration of the information transmitted to it by the Commission, affirms its previous determination, such determination, as affirmed, shall be subject to review in accordance with this subsection (other than this paragraph)."

A review of section 503 reveals that the Commission's options in dealing with Travis Peak are either to reverse or remand the case to the state jurisdictional agency. In light of information in the Commission's files submitted by Delhi which is inconsistent with Texas' recommendation, and which is not part of the record upon which such tight formation determination was made, the Commission under section 503(b)(2)(A) hereby remands Travis Peak to the Texas Railroad Commission. Section 503 provides no basis for holding hearings on tight formations. Therefore, the hearing previously ordered will be terminated as having no further force under NGPA section 503 and *Williston Basin* and Docket No. GP87-27-000 is hereby cancelled.

Accordingly, the Commission herewith issues notice of its preliminary finding under section 275.202(a)(1)(ii) (1986) that the determination submitted by the Texas Railroad Commission is not consistent with information which is contained in the public records of the Commis-

sion and which was not part of the record on which the jurisdictional agency made the determination. The Commission issues this notice of preliminary finding under section 275.202(a)(2)(1986), remanding Travis Peak to the jurisdictional agency.

The Commission notes that numerous motions are pending in this case requesting that the hearing be remanded to the state jurisdictional agency. In light of the *Williston Basin* decision and the new procedures under section 503, the Commission hereby dismisses all pending motions in this case. Comments may be submitted prior to the Commission's final finding pursuant to section 503.

Pursuant to section 503(b)(2)(B), the Commission must make its preliminary finding and notice thereof within 45 days after the date on which the Commission received notice of such determination under subsection (a)(2). However, since there was no notice prior to the *Williston Basin* decision that the Commission's review was under section 503 of the NGPA, and to avoid the untoward result of retroactive effectiveness of tight formation determinations, some of which have been pending at the Commission for years, the Commission concludes that the court's mandate on July 15, 1987, will be treated as the date of notification of the jurisdictional agency's tight formation determination.[10] Thus the 45 day period

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[10] Although the general rule is to apply court decisions retroactively, the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) enumerated three factors which should be weighed in determining whether to apply a particular judicial construction prospectively. First, any decision which establishes a new principle of law may be prospectively applied. The second factor is whether retroactive operation of the rule will further or retard the purpose and effect of the rule. The third factor involves equitable considerations. Using this test, the Commission concludes that the *Williston Basin* decision should be applied prospectively only. The decision established a new principle of law; retroactive application of the decision would retard the purpose of the rule because unsupported

will run from the date of the *Williston Basin* mandate. The Commission is hereby acting within the 45 days by issuing this notice of preliminary finding.[11]

The Commission orders:

(A) Pursuant to section 18 C.F.R. § 275.202(a)(i)(ii) (1987) and section 503(b)(2)(A) of the NGPA the Commission issues notice of a preliminary finding that the determination is not consistent with information which is contained in the public recording of the Commission and which was not part of the record on which the jurisdictional agency made its determination.

(B) Pursuant to section 18 C.F.R. § 275.202(f) (1987), jurisdictional agencies, interested parties, or any person may, within 30 days after issuance of the preliminary finding, submit written comments and request an informal conference with the Commission staff.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB,
Secretary.

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jurisdictional agency determinations which have been pending before the Commission for more than 45 days would otherwise be considered final; and such a result would be inequitable.

[11] Pursuant to section 553(d) of the Administrative Procedure Act, the Commission's new rule concurrently issued in Docket No. RM87-31-000 will be effective immediately except for the information collection provisions in §§ 271.703(c)(3) and (c)(4) which have been submitted to the Office of Management and Budget for approval. When these information collection provisions are approved by the Office of Management and Budget, the Commission will issue a notice in the *Federal Register* with the effective date for these information

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. GP87-27-000
(Formerly RM79-76-250)

TEXAS RAILROAD COMMISSION,
TRAVIS PEAK FORMATION
JD87-16493T

ERRATUM NOTICE

(August 3, 1987)

NOTICE OF PRELIMINARY FINDING AND
ORDER TERMINATING HEARING

(Issued July 29, 1987)

Page 6. Footnote 11, last sentence should read:

"When these information collection provisions are approved by the Office of Management and Budget, the Commission will issue a notice in the *Federal Register* with the effective date for these information collection provisions."

KENNETH F. PLUMB,
Secretary.

APPENDIX G

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse, Chairman;
Anthony G. Sousa,
Charles G. Stalon,
Charles A. Trabandt and
C. M. Naeve.

Docket No. GP87-27-002
(Formerly RM79-250)

TEXAS RAILROAD COMMISSION
TRAVIS PEAK FORMATION
JD87-16493T

ORDER REOPENING FINAL WELL CATEGORY DETERMINATIONS

(Issued November 25, 1987)

INTRODUCTION

On July 29, 1987, the Commission issued a notice of preliminary finding under section 503(b)(2) of the Natural Gas Policy Act (NGPA) that the determination by the Texas Railroad Commission (Texas) that the Travis Peak formation qualifies as a tight formation is inconsistent with information contained in the public records of the Commission and therefore should be remanded to Texas. This preliminary finding did not dispose of some

seventy-five notices of well category determinations listed in Appendix A which were submitted by Texas to the Commission after the Travis Peak area was designated as a tight formation in Order No. 450. Pursuant to section 275.202(a) of the Commission's regulations these determinations became final 45 days after the Commission received the notices from Texas. On January 9, 1987, the Commission vacated Order No. 450 in light of supplemental evidence filed by Delhi Gas Pipeline Corp. (Delhi). Since the preliminary finding was issued on July 29, 1987, several parties have filed pleadings requesting clarification of the status of these seventy-five well determinations. In response to these pleadings, and in light of the Commission's January 9, 1987 order vacating Order No. 450, and its final determination to remand the Travis Peak proceeding to Texas approved concurrently herewith, the Commission hereby reopens the determinations under section 275.205(a) on the basis that in making the determination, the jurisdictional agency relied on an untrue statement of material fact.

BACKGROUND

Section 107(c)(5) of the NGPA authorizes the Commission to designate certain types of natural gas as high-cost gas.[1] High-cost gas is gas which is produced under conditions which present extraordinary risks or costs, and once designated may receive an incentive price. The Commission issued a rule establishing that natural gas produced from tight formations is high-cost natural gas under NGPA section 107(c)(5).[2] Under this rule jurisdictional agencies may submit recommendations of areas for designation as tight formations for Commission approval.

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[1] 15 U.S.C. § 3317(c)(5) (1986).

[2] Order No. 99, Regulations Covering High-Cost Natural Gas Produced From Tight Formations, 45 Fed. Reg. 56,034 (Aug. 22, 1980), FERC Stats. and Regs. [Regulations Preambles 1977-1981] ¶ 30,183 (1980). 18 C.F.R. § 271.703 (1987).

On November 2, 1981, the Commission received a recommendation from Texas that the Travis Peak formation be designated a tight formation pursuant to section 271.703(c)(2)(i) of the Commission's regulations.[3] Travis Peak underlies 47 counties in Districts 5 and 6 in northeastern Texas. After reviewing the record and supplemental material including well location data provided by Texas Oil and Gas Corp. (TXO), the Commission on May 23, 1986, issued Order No. 450[4] which modified and adopted Texas' recommendation that Travis Peak be designated a tight formation under NGPA section 107(c)(5) but excluded certain "sweet spots" from the designation.[5]

On June 19, 1986, Delhi Gas Pipeline Corporation (Delhi) filed an application for rehearing of Order No. 450, which was later supplemented on October 6, 1986, arguing that Texas' recommendation contained stale information which was limited to fewer than half of the wells drilled into the formation. The data submitted by Delhi suggest that the average permeability and flow rates in Travis Peak may exceed the maximum permissible level for the formation to qualify as a tight formation under the Commission's regulations.[6] In an order issued July 21, 1986, the Commission granted rehearing of Order No. 450 solely for the purpose of affording the Commission more time to consider Delhi's request.[7] During the period of August 8 to August 29, 1986, Texas

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[3] 18 C.F.R. § 271.703(c)(2)(i) (1987).

[4] Docket No. RM79-76-090, 51 Fed. Reg. 19,164 (May 28, 1986), FERC stats. & Regs. ¶ 30,698.

[5] Excluded as sweet spots (areas of higher permeability) were the Bethany and the Carthage fields in Panola County. Also excluded were 31 additional gas wells which had high permeability values and all oil wells.

[6] 18 C.F.R. § 271-703(c)(2) (1987).

[7] 36 FERC ¶ 61,068 (1987).

submitted seventy-five notices of determination indicating that these completed wells had qualified for the tight formation price. These determinations became final 45 days after the Commission received the notices.[8]

The Commission concluded that Delhi's supplemental data raised doubts as to whether Travis Peak should be designated a tight formation, and on January 9, 1987, the Commission issued an order which granted Delhi's request for rehearing, vacated Order No. 450, reopened the record, and initiated a formal hearing to decide whether the additional evidence presented by Delhi and other parties contradicted a finding that Travis Peak met Commission standards for designation as a tight formation.[9] The Commission in its January 9 order granting rehearing noted that certain Travis Peak tight formation gas well determinations had become final well category determinations. This order recognized in a footnote that these determinations would be addressed in a subsequent order.

At a pre-hearing conference on April 29, 1987, the parties discussed whether these seventy-five final well category determinations would be subject to the outcome of the hearing. Pursuant to the procedures established by the presiding Administrative Law Judge for the hearing, EP Operating Company and Grace Petroleum, here-

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[8] Subsequent to August 29, 1987, the Commission also received sixty-seven tight formation notices of determination listed in Appendix B, which represent wells located in the area covered by Order No. 450. The Commission notified Texas that the 45-day period for Commission review would not begin until a final order issued on Travis Peak. For the same reasons that we are reopening the seventy-five final well category determinations, we now refer these sixty-seven notices back to Texas for further appropriate action. This action is taken in light of the final order remanding the Travis Peak determination to Texas approved by the Commission concurrently with this order.

[9] Docket No. RM79-76-250 52 Fed. Reg. 2401 (Jan. 22, 1987), FERC stats. and Regs. ¶ 30,724.

inafter collectively referred to as EPOC, filed a joint motion for clarification on May 15, 1987, raising the finality issue with regard to these wells [10], and Delhi filed a similar request for clarification of certain aspects of the record.

While the rehearing was pending in this proceeding the United States Court of Appeals for the District of Columbia Circuit rendered its decision in *Williston Basin Interstate Pipeline Co. v. FERC*, 816 F.2d 777 (D.C. Cir. 1987) (*Williston Basin*) in which the court concluded that the Commission's review of tight formation recommendations should be governed by the procedures of section 503 of the NGPA rather than the rulemaking authority of section 501. As a result of *Williston Basin*, the Commission on July 29, 1987, revised its regulations pertaining to tight formation gas in Order No. 479 [11] and pursuant to NGPA section 503(b)(2), issued a notice of preliminary finding and terminated the hearing already established. This finding was made on the ground that Texas' determination was not consistent with information contained in the public records of the Commission and which was not a part of the record upon which the determination was made. In the preliminary finding the Commission dismissed all motions pending before the Commission; however it did not address the two petitions for clarification filed by EOPC and Delhi which concerned the status of the seventy-five final well category determinations. Subsequent to the issuance of the notice of preliminary finding on July 29, 1987, two parties filed additional pleadings regarding the disposition of these seventy-five final well category determinations. Their positions are discussed below.

On August 28, 1987, EPOC and Grace jointly filed a motion for clarification or in the alternative a request

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[10] EPOC and Grace filed the motion jointly with Pennzoil Company and the Travis Peak Producers Group.

[11] 25 Fed. Reg. 29,003 (Aug. 5, 1987), FERC Stats. Regs. ¶ 30,759.

for rehearing of the preliminary finding. EPOC requests that the Commission clarify that it did not, by its July 29 order, deny EOPC's May 15, 1987 motion for clarification, insofar as it addressed the issue of the finality of the well category determinations. In the alternative, if the preliminary finding denies the May 15, 1987 motion, EOPC requests a rehearing of the preliminary finding. EOPC argues that the Commission must grant a rehearing and find that the seventy-five well determinations that became final were submitted in reliance on Order No. 450 and may not now be reopened.[12]

On September 14, 1987, Delhi filed a petition for clarification of the preliminary finding or in the alternative a petition to reopen and vacate final well category determinations. First, Delhi argues that these wells never qualified for incentive pricing since the Commission vacated its original finding that Travis Peak qualified as a tight formation before the designation became final. In response to EPOC's petition for clarification, Delhi argues that the designation of a formation as tight under NGPA section 107(c)(5) is a prerequisite for receiving a section 107(c)(5) well determination. Delhi states that since the Commission's January 9, 1987 order voided *ab initio* Order No. 450, the Travis Peak area never validly qualified as a tight formation and therefore that these seventy-five well category determinations were never valid. Alternatively, should the Commission find that these well determinations did become final, Delhi argues that they must be reopened and vacated because, Delhi claims, in making those determinations the Commission relied on an untrue statement of material fact. Delhi claims that whether or not Travis Peak is finally designated as a tight formation is a material fact, without which a well cannot qualify for an incentive price.

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[12] EP Operating Company and the Travis Peak Producers Group filed answers to Delhi's petition for clarification discussed below. These answers merely reassert the position of EPOC's original motion for clarification.

DISCUSSION

Section 503(d) of the NGPA [13] provides that a final determination made by a jurisdictional agency or by the Commission is binding upon the Commission unless, (1) in making the determination the Commission or jurisdictional agency relied on any untrue statement of a material fact; or (2) there was omitted a statement of material fact necessary in order to make the statements not misleading, in light of the circumstances under which they were made. On January 9, 1987, Order No. 450 was vacated. On July 29, 1987, the Commission issued its notice of preliminary finding and order terminating hearing in which the Commission announced its intention to remand the Travis Peak case to Texas due to evidence in the Commission's public records that is inconsistent with Texas' tight formation recommendation. By order approved concurrently herewith, that preliminary finding becomes a final determination. Thus, the subject seventy-five final well category determinations are based on an untrue statement of fact, namely that Travis Peak is designated a tight formation, and must be reopened.

The Commission is also suspending the 150 day period for final Commission action on reopening orders established by its rules.[14] This action is taken in order to permit Texas to reevaluate the character of Travis Peak in accordance with the Commission's order remanding that proceeding. No further regulatory action will be taken on the subject well category determinations until such time as the Commission has considered such further tight formation determinations related to Travis Peak as Texas deems appropriate to submit. The Commission also believes that the status of the subject wells is entirely dependent upon further action by Texas with regard to Travis Peak. Consequently, comments regard-

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[13] 15 U.S.C. § 3413(d).

[14] 18 C.F.R. § 275.205(d).

ing the reopening of the subject determinations are unnecessary at this time and should only be submitted after the Secretary issues the notice referred to in Ordering Paragraph (B) below.

The Commission Orders:

(A) Pursuant to 18 C.F.R. § 275.205(a) (1987) and section 503(d) of the NGPA the Commission reopens seventy-five well category determinations on the basis that in allowing the determinations to become final, the Commission relied on an untrue statement of material fact.

(B) The Commission suspends the running of the 150 day period for issuance of a final order provided in 18 C.F.R. § 275.205(d). The 150 days will not begin to run until the Secretary issues a notice lifting the suspension.

(C) The request for rehearing filed by EPOC is denied.

By the Commission.

[SEAL]

/s/ Lois D. Cashell
LOIS D. CASHELL,
Acting Secretary

[Appendix A and Appendix B Lodged with the Court]

APPENDIX H

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse, Chairman;
Anthony G. Sousa,
Charles G. Stalon,
Charles A. Trabandt and
C. M. Naeve.

Docket No. GP87-27-000
(Formerly RM79-76-250)

TEXAS RAILROAD COMMISSION
TRAVIS PEAK FORMATION
JD87-16493T

FINAL ORDER REMANDING JURISDICTIONAL AGENCY DETERMINATION

(Issued November 25, 1987)

INTRODUCTION

On July 29, 1987, the Commission issued a notice of preliminary finding under section 503(b)(2) of the Natural Gas Policy Act of 1978 (NGPA) that the determination by the Texas Railroad Commission (Texas) that the Travis Peak Formation qualifies as a tight formation is not consistent with information contained in the public records of the Commission and therefore should be remanded to Texas. The preliminary finding was made in

light of the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Williston Basin Interstate Pipeline Co. v. FERC*, 816 F.2d 777 D.C. Cir. 1987) (*Williston Basin*) holding that the Commission in reviewing jurisdictional agency tight formation recommendations must treat them as determinations under NGPA section 503 rather than as recommendations for rulemakings under NGPA section 501 as the Commission had done previously. Under section 503(b)(2) the Commission must issue a final finding within 120 days after the date of the preliminary finding. For the reasons stated below, the Commission hereby issues its final finding under NGPA section 503(b)(2) that Texas' tight formation recommendation for the Travis Peak area is not consistent with information contained in the public records of the Commission, and which is not part of the record upon which the determination was made. Accordingly, the determination is remanded to Texas for such further action as it deems appropriate.

BACKGROUND

Section 107(c)(5) of the NGPA, authorizes the Commission to designate certain types of natural gas as high-cost gas. High-cost gas is gas which is produced under conditions which present extraordinary risks or costs, and once designated may receive an incentive price. In Order No. 99,[1] the Commission ruled that natural gas produced from tight formations is high-cost natural gas under NGPA section 107(c)(5). The order provided that jurisdictional agencies may submit recommendations of areas to be designated as tight formations, subject to Commission approval. On November 2, 1981, the Com-

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[1] Regulations Covering High-Cost Natural Gas Produced From Tight Formations, FERC Statutes and Regulations ¶ 30,183 (1980); *reh'g denied*, FERC Statutes and Regulations ¶ 30,198 (1980) (Order No. 99-A); *aff'd* Pennzoil Co. v. FERC, 671 F.2d 119 (5th Cir. 1982).

mission received a recommendation from Texas that the Travis Peak formation be designated a tight formation. Travis Peak underlies 47 counties in Railroad Districts 5 and 6 in northeastern Texas. A notice of proposed rulemaking incorporating Texas' recommendation was issued on December 19, 1981, in Docket No. RM79-76-090 (later redesignated RM79-76-250). A review of the recommendation by the Commission staff indicated that the proposed area did not meet *in situ* permeability and flow rate requirements specified in section 271.703(c) of the Commission's regulations. Texas was so informed by letter dated January 22, 1982. On September 19, 1983, Texas submitted an amended recommendation, which was incorporated in a rulemaking notice issued on November 14, 1983.

On December 13, 1983, the staff met with Texas personnel in an effort to resolve continuing problems with the Travis Peak recommendation. The staff was informed that certain data in support of the recommendation was considered proprietary, that Texas could only identify the sample wells by a code number, and that a cross reference permitting the location of the sample wells to be identified had not been made available to Texas. Early in 1985, Texas Oil and Gas Corporation (TXO) was contacted and agreed to provide the well location data to the Commission on a proprietary basis. After reviewing the record and the well location data provided by TXO, the Commission on May 23, 1986, issued Order No. 450[2] modifying and adopting the Travis Peak recommendation. The Commission adopted Texas' recommendation for the most part, but excluded the Bethany and Carthage fields on Panola County as well as 31 individual gas wells which exhibited high permeability values, and all oil wells.

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[2] 51 Fed. Reg. 19,164 (May 28, 1986), FERC Stats. & Regs. ¶ 30,698.

On June 19, 1986, Delhi Gas Pipeline Corporation (Delhi) filed a request for rehearing of Order No. 450, arguing that Texas' recommendation was based on inadequate data representing less than half of the wells drilled into the formation. On July 21, 1986, the Commission issued an order granting rehearing of Order No. 450 solely for the purpose of further consideration. On October 6, 1986, Delhi filed a petition to supplement its application for rehearing, in which Delhi requested the Commission evaluate approximately 600 post-1980 well completions in the Travis Peak area. Delhi's supplemental information consisted of (1) an analysis of 53 post-1980 wells which Delhi alleged showed average permeability and flow rates in Travis Peak exceeding the maximum levels permitted under the Commission's regulations and (2) a report issued by the Gas Research Institute [3] which according to Delhi demonstrates that average permeability in the Travis Peak formation exceeds 1 millidarcy. The Commission concluded that Delhi's supplemental data raised doubts as to whether Travis Peak qualified as a tight formation, and on January 9, 1987, granted Delhi's request for rehearing, vacated Order No. 450, reopened the record, and initiated a formal hearing to decide whether the additional evidence presented by Delhi and other parties contradicted a finding that Travis Peak met Commission standards for designation as a tight formation.[4]

Meanwhile on April 24, 1987, the Court of Appeals rendered its decision in *Williston Basin* holding that the Commission's review of tight formation recommendations should be governed by the procedural scheme of section 503 of the NGPA rather than the broad rulemaking

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[3] "Comparative Engineering Field Studies and Gas Resources of the Travis Peak Formation, East Texas Basin," issued February 28, 1986.

[4] 52 Fed. Reg. 2,401 (Jan. 22, 1987).

authority permitted under section 501. As a result of *Williston Basin*, the Commission issued Order No. 479 [5] revising its regulations pertaining to tight formation gas. The Commission concurrently issued in this proceeding the order of July 29 giving notice of the preliminary finding to remand Travis Peak to Texas and cancelling the previously-ordered hearing. This finding was made on the ground that Texas' determination was not consistent with information contained in the public records of the Commission and which was not a part of the record upon which the determination was made.

Pursuant to NGPA section 503(b)(2)(B), the Commission must give notice of its preliminary finding within 45 days after the date on which the Commission received notice of the jurisdictional agency's determination. However, since there was no notice prior to *Williston Basin* that the Commission's review procedures under NGPA section 501 were invalid and to avoid the untoward result of having all pending tight formation determinations become automatically and retroactively final, the Commission ruled that the date of the court's mandate, July 15, 1987, would be treated as the date of notification of pending tight formation determinations. The Commission acted within 45 days of issuance of the mandate by issuing the notice of preliminary finding on July 29, 1987. Under section 503(b)(2)(B) the Commission must issue a final finding within 120 days after the date of the preliminary finding, or by November 26, 1987.

The July 29 order permitted all interested parties to submit written comments in response to the notice of preliminary finding within 30 days and to request an informal conference with the Commission staff. A number

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[5] 52 Fed. Reg. 29,003 (August 5, 1987). The Commission revised its regulations so that future tight formation recommendations would be considered as jurisdictional agency determinations under section 503 of the NGPA.

of filings were submitted including, in addition to comments and requests for an informal conference, a motion to modify and reissue the notice of preliminary finding, answers opposing the motion, "reply" comments, a motion to strike the reply comments, a request for rehearing of the July 29 order, a motion to strike the request for rehearing, requests for clarification, and answer in opposition to a request for clarification. An informal conference was held on October 16, 1987. On October 20, 1987, the Commission issued a notice permitting supplemental and reply comments to be filed on October 23rd and 30th, respectively. Additional comments and reply comments were received in response to the notice.

DISCUSSION

A. *Introduction*

Section 503 of the NGPA incorporates procedures whereby state and federal agencies with jurisdiction over the production of natural gas determine whether particular sources or supplies of natural gas qualify under various NGPA price categories. Once a jurisdictional agency notifies the Commission of its determination, such determination becomes final within 45 days unless action is initiated by the Commission prior to the expiration of 45 days to reverse or remand the determination. Section 503(b)(2) provides that if the Commission finds that a jurisdictional agency determination is not consistent with information contained in the public record of the Commission, and which is not part of the record upon which such determination was made, it may remand the matter to the jurisdictional agency for consideration of such information. Section 503(b)(1) provides that the Commission shall reverse any jurisdictional agency determination if it finds that such determination is not supported by substantial evidence in the record upon which such determination was made. In the notice of preliminary finding issued July 29, 1987, the Commission found that

the information submitted by Delhi which was contained in the Commission's files was inconsistent with Texas' recommendation and was not part of the record upon which the determination was made. Accordingly, under section 503(b)(2)(A), the Commission found that Travis Peak should be remanded to the Texas Railroad Commission.

B. *Remand Versus Reversal*

On August 10, 1987, Delhi filed a motion requesting the Commission to modify and reissue the notice of preliminary finding and thereby determine that the recommendation made by Texas is not supported by substantial evidence in the record upon which the determination was made, and that the determination should therefore be reversed under section 503(b)(1) rather than remanded. Delhi claims that TXO's well code information was required in order for the Commission to designate Travis Peak as a tight formation in Order No. 450, and that this information was never a part of the record before Texas. Delhi thus claims that without TXO's well location information Texas' recommendation was not supported by substantial evidence in the record upon which it was made.

On August 25, 1987, Texas, EP Operating Company (EPOC), and the Travis Peak Producer's Group (TPPG) responded in opposition to Delhi's motion of August 10, 1987. Texas argued that the well location data neither added to nor subtracted from the data on average permeability and flow rates which were contained in Texas' record, but permitted the Commission to exclude certain non-qualifying "sweet spots" based on "FERC's methodology for determining averages." Texas argues that a reversal is not appropriate in such circumstances. Texas reasons that until the preliminary finding, the Commission had considered tight formation recommendations under its broad rulemaking authority, and that under

this form of review there was no requirement that well location data be contained in the record before Texas. Texas also argues that to go back in time at this point and reverse its determination based on the lack of well location data in the Texas record would be tantamount to applying section 503 retroactively.

EPOC requests the Commission to deny Delhi's motion to reverse and to either vacate the preliminary finding, thereby affirming Texas' original recommendation, or remand the case to Texas, consistent with the preliminary finding.[6] EPOC argues that the Commission has stated in both Order No. 450 and the order vacating order No. 450 that it used the TXO information only to determine the location of wells and not for substantive production or completion information pertaining to tight formation guidelines. EPOC asserts that the TXO data merely clarified the Texas record concerning an issue that was not before Texas, but was only raised by the Commission on review of Texas determination. Grace Petroleum Corporation (Grace) joined in EPOC's answer. Grace in addition states that section 503(b)(2) of the NGPA provides for a remand to the jurisdictional agency in cases where the Commission finds that the information underlying the determination is incomplete. Grace argues that the record does contain substantial evidence to support Texas' recommendation, but that if the Commission believes the recommendation is contradicted by other evidence, the proper course is to remand the matter to Texas rather than to find an absence of substantial evidence leading to reversal of the determination under section 503(b)(1).

TPPG argues that the permeability and flow rate data in Texas' original recommendation meet the requirements set forth in section 271.703(c)(2) of the Commission's

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[6] On August 28, 1987 Grace Petroleum Corp. filed a joinder in the answer of EPOC filed August 25, 1987.

regulations, and thus the record as it existed on July 29, 1987 contained substantial evidence to support the designation in Order No. 450, if not the original recommendation. TPPG argues thatthe real issue involved is not whether the Texas record was incomplete without the proprietary well location data, but rather the long standing disagreement btween Texas and the Commission staff concerning the methods to be employed in measuring formation permeability and flow rates. Whereas advocates the use of a geometric mean to measure average permeability and flow rates throughout a formation, the staff advocates use of an arithmetic mean for that purpose. According to TPPG, it is not necessary under Texas' methodology of geometric averaging to establish the location of individual data wells in order to calculate average permeability and flow rates, whereas it is necessary to do so under the staff's method of arithmetic averaging. TPPG thus argues that the record was fully adequate to support Texas' original recommendation since it was based on geometric averaging. TPPG also argues that even if arithmetic averaging is used, the record supports the determination adopted in Order No. 450.

Under Delhi's analysis of the facts, the Commission arguably could reverse Texas' determination instead of remanding it to Texas. However, the Commission views the matter in a somewhat different light. In Order No. 450 the Commission approved the tight formation determination because it believed such a finding was supported by substantial evidence. The Commission made this decision after TXO submitted the well location information. This evidence was important not because it was the only information that supported a tight formation determination, as Delhi argues, but rather because it enabled the Commission to exclude non-qualifying portions of the Travis Peak area. We view as the basic problem with Texas' determination, not the lack of well location data in the Texas record but rather the questions raised by

the data submitted by Delhi on October 6, 1987, concerning the porosity and flow rates of subsequently drilled wells. We also agree with TPPG that the essential question of whether Travis Peak qualifies as a tight formation depends as much on differences in methodology between Texas and this Commission as on the prsence or absence of well location data in the Texas record. Delhi's motion to reverse rather than remand Texas' recommendation is therefore denied. The methodology issue is discussed in more detail in the analysis of the parties' comments *infra*.

C. *Implementation of Williston Basin*

A principal issue raised by the comments and other pleadings received in response to the July 29 notice of preliminary finding concerns the procedures and policies to be followed in implementing *Williston Basin*. As previously noted, the Commission in the order of July 29 decided to apply *Williston Basin* prospectively from the date of the court's mandate, reasoning that retroactive application would conflict with the purposes of the NGPA because jurisdictional agency determinations such as Travis Peak which had been pending for more than 45 days, but which were not properly supported, would nevertheless be considered final.

All parties agree that this issue should be determined in accordance with *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (*Chevron*), which enumerated three factors to be weighed in determining whether to apply a judicial decision retroactively or prospectively. First, the decision involved must decide a case of first impression, or otherwise establish a new rule of law. Second, consideration must be given to whether retroactive application of the new rule would further or retard the effect and purpose of the rule in question. Third, the equities involved must be carefully balanced.

TPPG argues that applying the *Chevron* test to the facts in the Travis Peak case demands retroactive application of *Williston Basin*, and that the Commission's lack of action within 45 days of the Texas' filing of November 2, 1981, accordingly mandates the finality of Texas' recommendation. TPPG argues that retroactive application of *Williston Basin* will not result in inequity or deprive parties of their day in court. Rather, it argues that retroactive application will achieve finality and give effect to the principle of law established in *Williston Basin*. TPPG argues that the Commission should apply section 503 "wholly retroactively" or, alternatively, should not apply those procedures at all and instead reinstate Order No. 450 as a final determination.

Texas argues that the Commission's decision to remand will result in a hybrid prospective/retroactive application of a new rule of law with no consideration of the equities as required by *Chevron*. Texas generally opposes what it interprets as retroactive application of *Williston Basin* by the Commission on the basis that such treatment would amount to reaching back in time to fault Texas for failing to consider information received into the Commisison's public files some five years after the Texas record closed. Texas states that the original record was properly made on the basis of the best evidence in existence at the time and argues that the Commission has failed to consider the inequity of treating tight formation designations as "moving targets rather than as an incentive program." Texas concludes that in order for an incentive program to work, producers must be able to rely upon the promise that they will be rewarded for their risk, and that the continuing uncertainty surrounding the Travis Peak area may create a disincentive to production that is greater than any past or present economic incentives. Texas maintains that the Commission's application of section 503 will, in effect, retard the operation of section 503, and concludes that if the Commission proceeds in the manner proposed, application of

section 503 should be uniformly retroactive, so that the Commission would have been compelled to act within the original 45-day period following receipt of Texas' determination, and would now be able to reopen the case only where Texas or the Commission had relied on an untrue statement or the omission of a a material fact.

Upon further consideration the Commission reaffirms its decision to apply the *Williston Basin* decision prospectively. First, it is clear that the *Williston Basin* decision established a new principle of law. Since the passage of the NGPA in 1978 and the issuance of Order No. 99 in 1980, the Commission has proceeded under its general rulemaking authority in considering tight formation designations. The *Williston Basin* decision negated continued reliance on rulemaking procedures and instead mandated the procedures set forth in NGPA section 503.

The Commission further finds that retroactive application of *Williston Basin* would not further the purposes of the NGPA. The NGPA provided for the establishment of incentive prices for high cost gas to the extent that such special price is necessary to provide reasonable incentives for the production of such high-cost natural gas. Retroactive application here would prevent the Commission from denying eligibility for such pricing for nonqualified gas. The Commission has consistently refused to apply judicial decisions retroactively that would, as here, "run directly counter to the explicit statutory purpose." [7]

Third, applying the *Williston Basin* decision retroactively would produce inequitable results in the Commission's judgment. TPPG argues that since producers have waited six years to obtain the designation, the Commission should not be able to review and rule on Texas' tight formation determination. However, the Commission cannot ignore its responsibility under section 503 of the

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[7] Eagle Power Co., 28 FERC ¶ 61,061, 61,112 (1984).

NGPA to review state agency determinations. Retroactive application of *Williston Basin* would force Delhi and the consuming public to pay above market prices for gas which might not qualify for incentive pricing, in contravention of the NGPA. Such a result is inequitable and weighs against retroactive application of *Williston Basin*. The inequity of retroactive application to consumers is not offset by comparable inequity to producers as a result of prospective application. TPPG and EPOC allege that producers may have relied on the prospect of incentive prices in drilling wells in the Travis Peak area and that it would be inequitable to now vitiate the relied upon incentive price after their wells have been drilled. However, Travis Peak was not approved as a tight formation until Order No. 450 was issued on May 23, 1986, and the approval was vacated on January 9, 1987. Order No. 450 was subject to rehearing subsequent to June 19, 1986. Therefore great weight cannot be given to the reliance argument. Furthermore, the Commission is remanding rather than reversing Texas' recommendation. Producers will have the opportunity to demonstrate that Travis Peak qualifies as a tight formation.

D. *Analysis of Comments*

Comments in response to the notice of preliminary finding were filed by Texas, EPOC and Grace Petroleum Company (Grace) (jointly), TPPG, and Delhi. Supplemental comments in response to the October 20 notice were filed by EPOC-Grace, TPPG, Delhi and Southern California Gas Company. Texas devotes its comments for the most part to the issue of how the *Williston Basin* decision should be implemented. Texas further argues that the plain language of section 503 clearly indicates that the determination of a jurisdictional agency is entitled to great deference by the Commission, and that Commission review of jurisdictional agency determinations is intened under the NGPA to be "limited and expeditious." Texas

argues that the best approach at this point is to either reinstate Order No. 450, or (under a retroactive application of *Williston Basin*) acknowledge the effectiveness of Texas' original recommendation.

EPOC and Grace argue that Texas' original recommendation was supported by substantial evidence and should be approved. EPOC-Grace outline the procedures followed by Texas in evaluating permeability and flow rates in the Travis Peak area and argue that based on the procedures and modes of analysis utilized by Texas it must be concluded that Texas' original 1981 recommendation was supported by substantial evidence within the meaning of *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," 305 U.S. at 229). EPOC-Grace also argue that "the principal issue from the start of this proceeding has been the longstanding debate between the Commission staff and the Railroad Commission of Texas, among other jurisdictional agencies, concerning the use of geometric mean averaging to determine expected formation permeability and flow rate characteristics." EPOC-Grace argue that while the Commission could lawfully exercise broad authority under its rulemaking power, its authority under section 503 is limited, and that it cannot reject Texas' method of geometric averaging simply because it prefers the arithmetic averaging method. EPOC-Grace also argue that the geometric averaging method has been shown to be a more accurate method, citing studies by experts in the field, (EPOC-Grace comments at 16). EPOC-Grace further argue that the data contained in Delhi's submittal of October 6, 1986, are inadequate in that some 727 post-1980 wells had been completed in Travis Peak through February 1986, but that Delhi provided data for only 53 selected wells. EPOC-Grave argue that in any event the Commission should not consider data obtained from drill-

ing activity which occurred after Texas' transmitted its recommendation to the Commission. On the basis of their comments, EPOC-Grace request the Commission to vacate the notice of preliminary determination and thereby permit the Texas recommendation to become final; alternatively, they request that the matter be remanded to Texas, limited to the data originally in the Texas record.

TPPG argues that the Commission should defer to the expertise of the Texas Commission with respect to the measurement of average permeability and flow rates. TPPG provides an extensive and detailed analysis of the geometric mean method of measuring these values and argues that the weight of authority and expert opinion supports use of this method in preference to the use of arithmetic averaging. Numerous examples of expert testimony and professional engineering studies and reports are provided to support this assertion. TPPG also provides an analysis of the data relied upon by Delhi in its submittal of October 6, 1986. TPPG argues that the February 28, 1986, report of the Gas Research Institute supports Texas' original recommendation assuming the use of geometric averaging methodology. TPPG also relies on a study by S.A. Holditch & Associates' of College Station, Texas which it commissioned and which according to TPPG shows that "when viewed in the proper context, the conclusion drawn by Delhi with respect to these [53] wells are unsupported and constitute an insufficient basis for a determination of 'inconsistency' on the part of the Commission." (TPPG comments at 13).[8] TPPG argues that the Delhi data should be rejected or, alternatively, that if the Commission does not approve Texas' original recommendation, it should approve the designation previously adopted in Order No. 450.

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[8] The study concluded, among other things, that the permeability values computed by Delhi represent only approximately one percent of the Travis Peak formation and are unrepresentative of the formation as a whole. (TPPG Comments, Appendix H).

Delhi in its comments renews its argument that Texas' recommendation should be reversed rather than remanded. In addition, Delhi submits a comprehensive study of gas and oil wells in the Travis Peak area prepared by Charles R. Connaughton of Core Laboratories of Irving Texas. This study is alleged to be based on all wells which could be identified as being Travis Peak completions in Railroad Districts 5 and 6 and includes over 2,300 gas completions. The study is stated to represent permeability and gas and oil production rates for 95 percent of all Travis Peak wells in Districts 5 and 6. The study concludes that the average permeability and production rates for both oil and gas wells are substantially in excess of the standards incorporated in the Commission's regulations. (Delhi comments, Appendix A, Exh. 1, p. 3). This study appears to be based on arithmetic averaging methodology. Delhi argues that this study supports the conclusion that Texas' determination is not consistent with information contained in the public records of the Commission and which was not part of the record upon which Texas made its determination.

In its supplemental comments, TPPG rebuts Delhi's study with additional expert testimony in support of the geometric averaging approach. TPPG also argues that the data underlying Delhi's study is seriously flawed. Delhi in its supplemental comments argues that based on the data underlying its study, average formation permeability exceeds Commission standards using either arithmetic or geometric methodologies. Delhi also filed supplemental reply comments responding in opposition to the supplemental comments of TPPG and EPOC-Grace. Southern California Gas Company (SoCalGas) also filed supplemental reply comments (only) fully supporting Delhi's position. In addition SoCalGas argues that the basis of the supplemental comments of TPPC, namely that "permeability is inversely proportional to net pay thickness . . ." is "totally incorrect." (SoCalGas com-

ments at 5). According to SoCalGas the "only conceivable connection between net pay thickness and permeability is that without permeability, there is not net pay hence no net pay thickness." (*Ibid.*). SoCalGas further argues that the arithmetic mean is a simple technique which applies equal weight to all data points, while the geometric mean tends to weight lower data points more heavily. It argues that the Commission should not abandon the use of the arithmetic mean to determine whether a formation qualifies as a tight formation. SoCalGas urges the Commission to return this matter to Texas "consistent with the standards established by this Commission." (*Id.* at 7).

Based on a review of the extensive comments submitted, the Commission concludes that the record supports and confirms the Commission's prior preliminary decision to remand this matter to Texas. We reach this decision principally on the ground that there exists, in our judgment, a genuine question as to whether the Travis Peak formation qualifies as a tight formation under the Commission's regulations in light of the data and studies submitted by Delhi. The comprehensive Core Laboratories study submitted to Delhi serves to confirm and reinforce the concerns which led the Commission to grant rehearing of Order No. 450 and to issue the notice of preliminary finding. We conclude that Texas's recommendation is inconsistent with the data submitted by Delhi to this Commission which is not a part of the record upon which the determination was made. Under these circumstances, section 503(b)(2) of the NGPA mandates that the matter be remanded to the responsible jurisdictional agency.

Several issues raised in the comments warrant further comment. Several parties' argue that the scope of Commission authority is more limited under section 503 there under the general rulemaking authority of section 501, and that the Commission is therefore obliged to adopt

Texas' recommendation if it meets the substantial evidence test, irrespective of the particular methods employed. The Commission agrees that in reviewing jurisdictional agency determinations, its authority is to some extent circumscribed. In *Kansas Corporation Commission*, 30 FERC ¶ 61,182, at 61,370 (1985), involving a negative well category determination by the Kansas Corporation Commission, the Commission stated as follows:

> TXO argues that we should interpret the geologic and geophysical data, including the testimony of its geologist to reach a determination contrary to that reached by KCC. We disagree.
>
> The Commission's authority to review a jurisdictional agency determination is "limited to determining the narrow question of whether or not the agency determination is supported by substantial evidence." We note that we are not permitted to "second guess" the jurisdictional agency by independently weighing the evidence and reversing the agency's determination as if the initial responsibility to make the determination were placed with [us]. (footnotes omitted).

The Commission believes it would be a breach of its authority to independently weigh the conflicting evidence in this record and attempt to determine average permeability and flow rates for Travis Peak. We hold in this order only that we have sufficient authority under section 503 of the NGPA to remand this matter to Texas for its further consideration based on the record before us. While it is true that the Commission has in the past used an arithmetic averaging method to determine permeability and flow rates, we decline to rule, in light of *Williston Basin*, that jurisdictional agencies must follow an arithmetic averaging method. We believe that issue is best left for determination in the first instance by the jurisdictional agency, subject to Commission review under the procedures set forth in section 503. We will address the issue of methodology, if necessary, at such time

as agency determinations come before the Commission in the future.

Several parties argue that it is unfair and inequitable to consider data for wells drilled subsequent to Texas' original determination; that the result is a "moving target." The Commission recognizes the force of this argument, but concludes, on balance, that such data must be considered in this instance. The so-called "moving target" problem arises in this case primarily as a result of its unusual procedural history. Tight formation recommendations have historically been expeditiously reviewed and for the most part approved by the Commission. However in this case, the Commission had difficulty with the Travis Peak recommendation from the beginning. Delays were caused by various factors including review of the original recommendation and the conclusion that the recommendation did not meet Commission guidelines, submittal of a revised proposal by Texas, meetings with Texas personnel concerning the revised recommendation, acquisition of the well code data from TXO, issuance of Order No. 450, vacation of Order No. 450, and issuance of the notice of preliminary determination. This case, in short, has been characterized by an unusual and obviously protracted procedural history. While this is regrettable, nevertheless it is the Commission's view that taking the situation as it stands, there is no basis to justify ignoring the data which are actually available for purposes of determining the permeability and flow rate characteristics of Travis Peak. This includes data for wells drilled subsequent to the date of the original Texas recommendation. Consistent with this view, we have considered and rely for decisional purposes on the studies submitted by Delhi. We do not adopt or endorse these studies. We hold only that they support the decision to remand the matter to Texas.

Finally, we decline to reinstate Order No. 450 as requested by several parties. We believe such action is not

warranted in light of the data submitted by Dehli. More importantly, we believe such action would be inconsistent with *Williston Basin*, since under NGPA section 503 the Commission is limited to approving, reversing or remanding the jurisdictional agency's determination.

E. *Pending Well Category Determination*

Delhi and EPOC filed petitions requesting the Commission to clarify the effect of the preliminary finding on some seventy-five well category determinations in the Travis Peak area that have become final subsequent to the issuance of Order No. 450. Delhi argues that tight formation well determinations for certain natural gas wells in the Travis Peak area which were entered during the nine-month period between the issuance of Order No. 450 on May 23, 1986 and the January 9, 1987 order that vacated Order No. 450, were not valid determinations. EPOC contends that these seventy-five well category determinations are valid and therefore may not be reopened and vacated. The status of these final well category determinations is the subject of a separate order being issued concurrently in this docket.

CONCLUSION

Upon review of the pleadings and comments submitted in this proceeding, the Commission reaffirms its decision in the preliminary finding to remand the Travis Peak proceeding to Texas. In the Commission's judgment, the data submitted by Delhi raise legitimate doubts as to whether Travis Peak qualifies as a tight formation under the applicable standards of the Commission's regulations. We do not believe the Delhi evidence is dispositive; however the Commission concludes that proper implementation of section 503 of the NGPA requires that the Commission provide Texas with the opportunity to review the technical record in this case and render a determination before the Commission can decide whether or not the determination is supported by substantial evidence.

The Commission orders:

(A) The Commission hereby remands the Travis Peak tight formation proceeding to Texas Railroad Commission.

(B) The August 28, 1987, request for rehearing filed by the Travis Peak Producers Group is denied. Pending motions to strike are also denied.

By the Commission

(SEAL)

/s/ Lois D. Cashell
LOIS D. CASHELL,
Acting Secretary.

APPENDIX I

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse, Chairman;
Anthony G. Sousa,
Charles G. Stalon,
Charles A. Trabandt and
C. M. Naeve.

Docket No. GP87-27-000
(Formerly RM79-250)

TEXAS RAILROAD COMMISSION
TRAVIS PEAK FORMATION
JD87-16493T

ORDER DISMISSING REQUESTS FOR REHEARING AND CLARIFYING PRIOR ORDER

(Issued January 25, 1988)

BACKGROUND

On December 24, 1987, Delhi Gas Pipeline Corporation (Delhi) filed a petition for clarification and request for rehearing of the Commission's order issued in the above-captioned proceeding on November 25, 1987.[1] On December 28, 1987, Enserch Exploration, Inc., (Enserch)

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[1] 41 FERC § 61,242 (1987).

as managing general partner for EP Operating Company and Winchester Oil Company, also filed a request for rehearing of the November 25 order. In that order the Commission reopened 75 final well category determinations pursuant to Section 275.205(a) of the Commission's regulations and Section 503(d) of the Natural Gas Policy Act of 1978 (NGPA). These well determinations were reopened in light of the Commission's action in an order issued concurrently on November 25, 1987, remanding the recommendation of the Texas Railroad Commission (Texas) that the Travis Peak area underlying 47 counties in Texas Railroad Districts 5 and 6 be designated as a tight formation. All of the wells in question are located in the Travis Peak area.

In the reopening order the Commission suspended the normal 150-day time limit within which the Commission must act if it wishes to vacate the determinations, and thereby provided that the status of determinations would be held in abeyance pending Texas' action on the remanded tight formation proceeding. The 75 well category determinations in question were submitted by Texas to the Commission after the Travis Peak area was designated as a tight formation in Order No. 450.[2] Pursuant to Section 275.202(a) of the Commission's regulations these determinations became final 45 days after notification by Texas.

POSITION OF THE PARTIES

Dehli requests the Commission to clarify its November 25 reopening order to correct a misidentification of one of the wells[3] and to grant rehearing and vacate rather than reopen the subject well category determinations. Alternatively, Delhi seeks rehearing of the Commission's

[2] 51 Fed. Reg. 19164 (May 28, 1986).

[3] Delhi states that the "Whiteman Decker GU 2 W2" well is misidentified in Appendix A of the November 25 order and requests correction. The request is granted.

decision to suspend the 150-day period for final Commission action on the reopened wells and requests the Commission to issue an order vacating the well determinations within 150 days. According to Delhi, it is a fruitless exercise to merely reopen the 75 wells since, as Delhi reasons, the ultimate determining issue of whether Travis Peak was a qualifying tight formation when the individual well applications were submitted, has already been decided by the Commission in its January 9, 1987 order,[4] vacating the Travis Peak tight formation designation adopted in Order No. 450.

Delhi also contends that the Commission's decision to suspend the 150-day period for final action on the reopening order is invalid because it is not supported by reasoned analysis and deprives Delhi of procedural safeguards. Delhi argues that under Section 275.205(d) of the regulations, the right to collect the tight formation price does not terminate until the date of the final order vacating the determination. Delhi argues that the 150-day limit protects purchasers from lengthy exposure to a higher price while the final order is forthcoming. Delhi claims that because no final order will be issued until the conclusion of the remanded proceeding before Texas, gas purchasers will remain subject to the tight formation price despite the Commission's vacation of the tight formation. According to Delhi, the Commission's decision ignores the substantial burden that the suspension places on Delhi and other gas purchasers by exposing them to an unjustified price for an unduly lengthy period.

Enserch argues that the November 28 reopening order exceeded the scope of Commission authority under the NGPA and departed from applicable precedent without justification. Enserch contends that since the Commission, after reviewing the well determinations under NGPA Section 503, failed to act within 45 days following

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[4] 52 Fed. Reg. 2401 (Jan. 22, 1987).

notification by Texas, the determinations became final and cannot be reopened except in accordance with section 503 (d) of the NGPA and section 275.205 of the Commission's regulations, under which reopening is permitted only in cases involving erroneous or omitted statements of material fact. Enserch disputes the Commission's finding in the reopening order that in making the determination that the wells qualified for the tight formation price, Texas relied on an untrue statement of material fact (that Travis Peak qualified as a tight formation).

Enserch relies on *Mobil Oil Exploration and Producing Southeast Inc. v. FERC*, 34 FERC ¶ 61,211 (1986) (*Mobil*) in which the Commission held that for a statement to constitute an "untrue statement of material fact" for purposes of vacating well category determinations it must have been known to the operator at the time the application for a well category determination was made. Although in *Mobil* subsequent data revealed that statements made by the operators were incorrect at the time of their application for a well category determination, the statements were not known to be untrue as of the date of application. Based on these circumstances, the Commission in *Mobil* declined to reopen the original determinations. Enserch asserts that, as in *Mobil*, the Travis Peak operators made no untrue statements of material fact at the time the subject well determination applications were filed, and that there is thus no basis for the Commission's finding that the determinations should be reopened.

DISCUSSION

The November 25 reopening order is procedural in nature and is thus not a final Commission decision subject to rehearing under the provisions of the NGPA or the Commission's regulations. See 18 C.F.R. § 385.713. The requests for rehearing will accordingly be dismissed.

However, even if rehearing were deemed to lie, Delhi and Enserch have not set forth any facts or arguments which would justify modification of the November 25 order. Delhi requests the Commission to vacate the well determinations instead of waiting for further action by Texas on remand. Delhi argues that suspending the 150-day period for comments exposes it to a higher price which is clearly unjustified. Delhi's arguments are not persuasive.

The fact that the Travis Peak determination was remanded to Texas, subject to its further consideration and action, leads us to conclude that the 75 well category determinations should be reopened rather than vacated. While the facts might arguably permit vacating the determinations, we believe that reopening is the better course. First, there is no authority for owners of the 75 wells to collect the tight formation price subsequent to January 9, 1987, the date on which Order No. 450 was vacated. Retroactive collections will be permitted only in the event Travis Peak is ultimately approved as a tight formation.[5] In the event a tight formation designation is ultimately denied, producers will be required to refund all excess collections prior to January 9, 1987, if any, with interest. The interest of purchasers and consumers of gas from the 75 wells are thereby protected. Alternatively, if the well category determinations were to be vacated now and refunds (if any) made, and if Travis Peak were subsequently approved as a tight formation, producers would then be eligible to re-collect the previously refunded amounts. We conclude that under these circumstances it is preferable to continue the *status quo* with respect to the well category determinations pending

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[5] *See* Order No. 99, Regulations Covering High-Cost Natural Gas Produced From Tight Formations, 45 Fed. Reg. 56,034 (Aug. 22, 1980) at 56,042; Order No. 479, Procedures for Determining High-Cost Natural Gas Produced From Tight Formations, 52 Fed. Reg. 29,003 (Aug. 5, 1987).

a final decision on the issue of tight formation designation.

The arguments submitted by Enserch are likewise without merit. Reopening of the subject well category determinations based on an untrue statement of material fact is clearly justified under the terms of section 503 (d)(1)(A) of the NGPA and section 275.205 of the Commission's regulations. The *Mobil* case relied upon by Enserch is inapposite to the issue of whether the Travis Peak well category determinations may be reopened, primarily because it did not involve any issues pertaining to tight formation designations. It is apparently Enserch's position that even if the Travis Peak area is ultimately denied tight formation status, the well category determinations in question cannot be reopened or vacated since they have become final.

This view must be rejected. Tight formation well category determinations are dependent upon the existence of an underlying determination that the formation in which the wells are drilled qualifies as a tight formation. Without a tight formation designation there can be no entitlement to the NGPA section 107(c)(5) price. Order No. 450 was vacated by the order of January 9, 1987, and therefore does not provide any basis for collecting the 107 price. Entitlement to such price must await final action in the remanded proceeding. If Travis Peak is ultimately designated as a tight formation, collection of the section 107 price will be permitted; if not, no collections will be permitted and any collections made prior to January 9, 1987 will be required to be refunded. The Commission knows of no theory of law or policy which would justify any other result.

The Commission orders:

(A) The requests for rehearing filed by Delhi and Enserch are dismissed.

(B) Appendix A of the November 25, 1987 reopening order is corrected as provided by this order.

By the Commission.

(SEAL)

/s/ Lois D. Cashell
LOIS D. CASHELL,
Acting Secretary.

APPENDIX J

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse, Chairman;
Anthony G. Sousa,
Charles G. Stalon,
Charles A. Trabandt and
C. M. Naeve.

Docket No. GP87-27-003
(Formerly RM79-76-250)

TEXAS RAILROAD COMMISSION
TRAVIS PEAK FORMATION
JD87-16493T

ORDER DISMISSING REQUESTS FOR REHEARING

(Issued January 25, 1988)

BACKGROUND

On December 24, 1987, Delhi Gas Pipeline Corporation (Delhi) filed a request for rehearing of the Commission's order issued in the above-captioned proceeding on November 25, 1987.[1] On December 28, 1987, the Travis Peak Producers Group (TPPG) and Enserch Exploration Company, as managing general partner for EP Operating Company (Enserch), also filed requests for re-

[1] 41 FERC § 61,213 (1987).

hearing of the November 25 order. In that order the Commission issued a final determination under section 503(b)(2) of the Natural Gas Policy Act of 1978 (NGPA) that the Texas Railroad Commission's (Texas) designation of the Travis Peak area underlying Texas Railroad districts 5 and 6 as a tight formation is not consistent with information contained in the public records of the Commission, and which information is not part of the record upon which the determination was made. The Commission remanded the determination to Texas for such further action as it deems appropriate. The Commission reached this decision on the ground that there exists a genuine question as to whether the Travis Peak formation qualifies as a tight formation under the Commission's regulations in light of certain data and studies submitted by Delhi.

POSITION OF THE PARTIES

In its request for rehearing, Delhi renews the argument it has asserted since the preliminary finding was issued in this proceeding on July 29, 1987,[2] namely that Texas' recommendation is not supported by substantial evidence in the record upon which the determination was made, and that the determination should therefore be reversed under NGPA section 503(b)(1) rather than remanded. In support, Delhi repeats its contention that Texas did not have in the record before it the well code data alleged to be necessary to support a tight formation finding. In addition, Delhi argues that Texas' determination should be reversed for lack of substantial evidence in the record because it was made without any record evidence to support a finding that the formation met the oil flow-rate criterion (5 barrels per day maximum production) set forth in section 271.703(c)(2)(C) of the Commission's regulations.

Delhi further argues that the Commission lacked authority to modify Texas' recommendation in order to cure

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[2] 40 FERC § 61,000 (1987).

the lack of substantial evidence regarding sweet spots and oil flow-rates. Specifically, Delhi contends that the Commission's modification of Texas' recommendation, undertaken pursuant to its NGPA section 501 rulemaking authority, was improper in view of the holding in *Williston Basin Interstate Pipeline Co. v. FERC*, 816 F.2d 777 (D.C. Cir. 1987) (*Williston Basin*). *Williston Basin* holds that tight formation determinations must be conducted under NGPA section 503, rather than the rulemaking provisions of section 501. Delhi argues that if the Commission had proceeded under the authority of section 503, it could not have acted on its own to modify the Texas recommendation because section 503 authorizes the Commission to approve, reverse or remand (but not modify) state agency determinations. Finally, Delhi argues that while reversal is dictated solely on the basis of the lack of evidence before Texas, Delhi's supplemental submissions in this docket have demonstrated that the oil flow-rate criterion cannot be satisfied for the Travis Peak area.

In its request for rehearing, Enserch also reiterates arguments previously relied on in response to the preliminary finding. Enserch contends that in its remand order the Commission erred by (1) relying upon information supplied by Delhi that was filed after the Commission approved the designation of the Travis Peak area as a tight formation in Order No. 450 and after the thirty-day period for rehearing of that order had run; (2) exceeding the scope of its statutory authority under section 503 of the NGPA to review state agency determinations by "second guessing" Texas' analytical technique for measuring the permeability and flow rates of the Travis Peak formation; and (3) failing to provide a reasoned explanation for its decision to remand the Texas designation back to Texas, as opposed to affirming Texas' recommendations.

TPPG renews its prior contention that the Commission should have accepted Texas' original recommendation that

Travis Peak qualified as a tight formation. TPPG contends that by determining that the late-filed material submitted by Delhi forms the basis for remanding this case to Texas, the Commission has overstepped its discretion under section 503(b)(2) of the NGPA and has ignored the standard of reasoned decision-making. TPPG reasons that tight formation designations were to be based on *expected* average permeabilities and *expected* average flow rates at certain depths and that the evidence considered was to be that available to the jurisdictional agency at the time its record was developed, not evidence developed subsequently. TPPG also restates its prior argument that failure to approve Texas' recommendation frustrates the good faith reliance on the designation process by the operators who responded by making investments and assuming risks in connection with drilling in the Travis Peak area.

DISCUSSION

Final determinations made by the Commission pursuant to section 503(b)(1) and (2) of the NGPA are not subject to rehearing. After a final order remanding a determination is issued by the Commission, a party's only recourse is to seek judicial review of the Commission's decision, as provided by section 503(b)(4). This interpretation of the terms of section 503 is based on the actual wording of the section and on the nature of the section 503 procedures, under which the opportunity for the filing of comments in response to a preliminary finding constitutes the functional equivalent of rehearing. This interpretation is fully consistent with and supported by the comments on the NGPA set forth in the Joint Explanatory Statement of the Committee on Conference.[3]

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[3] The Conference Committee stated as follows with regard to the remand procedures under NGPA section 503(b)(2) (mimeo at 118):

> The provisions allowing Commission remand of a State or Federal agency determination are intended to provide a means

Even if rehearing of the Commission's final order were deemed to lie, Delhi, Enserch and TPPG have presented no facts or arguments which would warrant modification of the November 25 remand order. The applications for rehearing represent for the most part restatements of arguments previously considered and fully answered in the remand order. No further discussion of these arguments is necessary; however two issues raised by Delhi warrant further comment.

Delhi argues that because Texas' record did not contain any evidence to demonstrate that the Travis Peak area satisfied the oil flow-rate criterion for tight formation qualification, the determination must be reversed. Delhi notes that in Order No. 450 the Commission found that Texas' recommendation was not supported by any data with respect to oil flow rates. This argument is without merit. First, Delhi somewhat exaggerates the inadequacy of the Texas record concerning oil well production.[4] More importantly, Texas, on September 19, 1983, submitted a revised recommendation proposing, among other things, to exclude all oil wells from the area

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for resolving conflicts caused by information available to the Commission where such information was not a part of the record before the State agency. This provision is not intended to allow undue delay in the determination process. Thus, a party aggrieved by a Commission remand order has the option of seeking judicial review of such remand, based on the arbitrary and capricious standard.

[4] In Order No. 450, the Commission stated as follows (51 *Fed. Reg.* at 19,165, n. 8):

> Texas' recommendation states that 96 percent of total production from the recommended area on a Btu basis is natural gas, twenty percent of the wells are oil wells, and 11 percent of the wells may produce as much as 5 barrels of oil per day. It is therefore reasonable to conclude that the flow rate of some oil wells may be within permissible levels. Based on the limited information available, however, excluding all oil wells from the recommended area ensures that the guidelines are met.

to be considered for tight formation recommendation. Notice of the revised proposal was issued on November 14, 1983. 48 *Fed. Reg.* 52,482 (Nov. 18, 1983). The Commission in Order No. 450 accepted Texas' proposal to exclude the oil wells. Thus, the question of whether and to what extent the original Texas record did or did not contain adequate oil well production data is irrelevant to the remand question.

Delhi also argues that the Commission lacked authority in Order No. 450 to modify Texas' recommendation. Delhi argues that the Commission's *sua sponte* modification of Texas' recommendation, undertaken pursuant to its NGPA section 501 rulemaking authority, was improper in view of the holding in *Williston Basin*. Delhi argues that if the Commission had been proceeding under the proper authority (i.e. section 503), it could not have acted on its own to modify the Texas recommendation. Using this theory to reverse rather than remand the Travis Peak proceeding would amount to a blatantly retroactive application of *Williston Basin*, a policy the Commission declined to adopt in its November 25 remand order. The Commission reaffirms its decision to apply the *Williston Basin* decision prospectively as explained in the remand order.

The Commission orders:

The requests for rehearing of Delhi, Enserch and TPPG are dismissed.

By the Commission.

(SEAL)

/s/ Lois D. Cashell
LOIS D. CASHELL,
Acting Secretary.

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4066

ENSERCH EXPLORATION, INC., ETC.,
Petitioner,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for Review of an Order of the
Federal Energy Regulatory Commission

ON PETITION FOR REHEARING

(November 30, 1989)

Before CLARK, Chief Judge, BROWN and JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Sam Johnson
SAM JOHNSON
United States Circuit Judge

11-28-89

APPENDIX L

NATURAL GAS POLICY ACT OF 1978

Section 503, 15 U.S.C. § 3413. Determinations for qualifying under certain categories of natural gas

(a) General rule.—

(1) Determination.—If any State or Federal agency makes any final determination which it is authorized to make under subsection (c) of this section for purposes of—

(A) applying the definition of new natural gas under section 3312(c) of this title;

(B) deciding if certain natural gas produced from the Outer Continental Shelf qualifies under section 3312(d) of this title for the new natural gas ceiling price;

(C) applying the definition of new, onshore production well under section 3313(c) of this title;

(D) applying the definition of high-cost natural gas under section 317(c) of this title; or

(E) applying the definition of stripper well natural gas under section 3318(b) of this title;

such determination shall be applicable under this chapter for such purposes unless such determination is reversed under the provisions of subsection (b) of this section or unless such State or Federal agency has waived its authority under the provisions of subsection (c) of this section.

(2) Notice to Commission.—Any Federal or State agency making a determination under paragraph (1) shall provide timely notice in writing of such determination to the Commission. Such notice shall include such substantiation and be in such a manner as the Commission may, by rule, require.

(b) Commission review.—

(1) Authority to review and reverse.—The Commission shall reverse any final State or Federal agency determination described in subsection (a) of this section if—

(A) it makes a finding that such determination is not supported by substantial evidence in the record upon which such determination was made; and

(B) such preliminary finding and notice thereof under paragraph (3) is made within 45 days after the date on which the Commission received notice of such determination under subsection (a)(2) of this section and the final such finding is made within 120 days after the date of the preliminary finding.

(2) Remand on basis of Commission information.—If—

(A) the Commission finds that a State or Federal agency determination is not consistent with information contained in the public records of the Commission, and which is not part of the record upon which such determination was made; and

(B) such preliminary finding and notice thereof under paragraph (3) is made within 45 days after the date on which the Commission received notice of such determination under subsection (a)(2) of this section and the final such finding is made within 120 days after the date of the preliminary finding,

it may remand the matter to such State or Federal agency for consideration of such information. If such agency, after consideration of the information transmitted to it by the Commission, affirms its previous

determination, such determination, as so affirmed, shall be subject to review in accordance with this subsection (other than this paragraph).

(3) Notice.—The Commission shall provide notice of any proposed finding under this subsection to the State or Federal agency which made such determination and those parties identified in the notice to the Commission of such determination.

(4) Judicial review of Commission actions.—

(A) Remands.—Any party identified in the notice to the Commission of a determination by a State or Federal agency may obtain review of any final decision by the Commission to remand under paragraph (2) in the United States Court of Appeals for any circuit in which such party is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. The reviewing court shall reverse any such decision if it finds such decision is arbitrary or capricious.

(B) Findings.—Any person aggrieved or adversly affected by a final finding of the Commission under paragraph (1) may within 60 days thereafter file a petition for review of such finding in the United States Court of Appeals for any circuit in which the party involved in such determination is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. The reviewing court shall reverse any such finding of the Commission if the State or Federal agency determination involved is supported by substantial evidence.

(c) State authority.—

(1) General rule.—A Federal or State agency having regulatory jurisdiction with respect to the pro-

duction of natural gas is authorized to make determinations referred to in subsection (a) of this section.

(2) Waiver.—

(A) In general.—Any Federal or State agency may, in whole or in part, waive its authority to make determinations referred to in subsection (a)(1) of this section by entering into an agreement in accordance with subparagraph (B). If such agency executes such a waiver, the Commission shall, consistent with the agreement, make the determinations which would otherwise be made by such Federal or State agency until the earlier of—

(i) the expiration of the period specified in the agreement or

(ii) the date such agency transmits to the Commission written notice that it terminates such waiver and assumes the authority to make determinations referred to in subsection (a)(1) of this section.

Any waiver, or termination of any waiver, shall not apply to any determination with respect to any petition therefor which is pending before such agency or the Commission (as the case may be) on the date on which such a waiver or revocation is made.

(B) Agreements.—Any waiver under subparagraph (A) may be made only by a written agreement between the Federal or State agency involved and the Commission. Any such agreement shall set forth the terms and conditions applicable to such waiver.

(3) Procedures applicable.—Determinations of a Federal or State agency referred to in subsection

(a)(1) of this section shall be made in accordance with the procedures generally applicable to such agency for the making of such determinations or comparable determinations under the provisions of Federal or State law, as the case may be, pursuant to which they exercise their regulatory jurisdiction. The Commission may prescribe the form and content of filings with a Federal or State agency in connection with determinations made under this section.

(4) Judicial review.—Any such determination referred to in subsection (a)(1) of this section made in accordance with procedures described in paragraph (3) shall not be subject to judicial review under any Federal or State law except as provided under subsection (b) of this section.

(d) Effect of determinations.—For purposes of this chapter.—

(1) General rule.—Any final determination referred to in subsection (a)(1) of this section made by a Federal or State agency (or by the Commission under subsection (c)(2) of this section) which relates to any natural gas and which is no longer subject to review by the Commission under this section or to judicial review shall thereafter be binding with respect to such natural gas. The preceding sentence shall not apply to any final determination—

(A) if in making such determination the Commission or such Federal or State agency relied on any untrue statement of a material fact; or

(B) if there was omitted a statement of material fact necessary in order to make the statements made not misleading, in light of the circumstances under which they were made, to the Federal or State agency in making such

final determination or to the Commission in reviewing such determination.

(2) Application of title 18.--Any untrue statement or omission of material fact to a Federal or State agency upon which the Commission relied shall be deemed to be statement or entry under section 1001 of Title 18.

* * * *

Section 506, 15 U.S.C. § 3416. Judicial review

(a) Orders.—

(1) In general.—The provisions of this subsection shall apply to judicial review of any order, within the meaning of section 551(6) of Title 5 (other than an order assessing a civil penalty under section 3414(b)(4) of this title or any order under section 3363 of this title), issued under this chapter and to any final agency action under this chapter required to be made on the record after an opportunity for an agency hearing.

(2) Rehearing.—Any person aggrieved by any order issued by the Commission in a proceeding under this chapter to which such person is a party may apply for a rehearing within 30 days after the issuance of such order. Any application for rehearing shall set forth the specific ground upon which such application is based. Upon the finding of such application, the Commission may grant or deny the requested rehearing or modify the original order without further hearing. Unless the Commission acts upon such application for rehearing within 30 days after it is filed, such application shall be deemed to have been denied. No person may bring an action under this section to obtain judicial review of any order of the Commission unless—

(A) such person shall have made application to the Commission for a rehearing under this subsection; and

(B) the Commission shall have finally acted with respect to such application.

For purposes of this section, if the Commission fails to act within 30 days after the filing of such application, such failure to act shall be deemed final agency action with respect to such application.

(3) Authority to modify orders.—At any time before the filing of the record of a proceeding in a United States Court of Appeals, pursuant to paragraph (4), the Commission may, after providing notice it determines reasonable and proper, modify or set aside, in whole or in part, any order issued under the provisions of this chapter.

(4) Judicial review.—Any person who is a party to a proceeding under this chapter aggrieved by any final order issued by the Commission in such proceeding may obtain review of such order in the United States Court of Appeals for any circuit in which the party to which such orders relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. Review shall be obtained by filing a written petition, requesting that such order be modified or set aside in whole or in part, in such Court of Appeals within 60 days after the final action of the Commission on the application for rehearing required under paragraph (2). A copy of such petition shall forthwith be transmitted by the clerk of such court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have

jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to such order of the Commission shall be considered by the court if such objection was not urged before the Commission in the application for rehearing unless there was reasonable ground for the failure to do so. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as the court deems proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive. The Commission shall also file with the court its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(5) Orders remain effective.—The filing of an application for rehearing under paragraph (2) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under paragraph (4) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(b) Review of rules and orders.—Except as provided in subsections (a) and (c) of this section, judicial review of any rule or order, within the meaning of section 551(4) of Title 5, issued under this chapter may be obtained in the United States Court of Appeals for any appropriate circuit pursuant to the provisions of chapter 7 of Title 5, except that the second sentence of section 705 thereof shall not apply.

* * * *

APPENDIX M

REGULATIONS OF THE FEDERAL ENERGY REGULATORY COMMISSION

18 C.F.R. § 271.703 Tight formations.

(c) *Determination of tight formations.*

(1) *General.* Determinations by a jurisdictional agency must be made in the form and manner prescribed in Part 274 of this chapter.

(2) *Guidelines.* (i) The guidelines for tight formation are as follows:

(A) The estimated average *in situ* gas permeabiilty, throughout the pay section, is expected to be 0.1 millidarcy or less.

(B) The stabilized production rate, against atmosphere pressure of wells completed for production in the formation, without stimulation, is not expected to exceed the production rate determined in accordance with the following table:

If the average depth to the top of the formation (in feet)		The maximum allowable production rate (in thousand cubic feet per day) may not exceed—
exceed—	but does not exceed—	
0	1,000	44
1,000	1,500	51
1,500	2,000	59
2,000	2,500	68
2,500	3,000	79
3,000	3,500	91
3,500	4,000	105
4,000	4,500	122
4,500	5,000	141
5,000	5,500	163
5,500	6,000	188

If the average depth to the top of the formation (in feet)		The maximum allowable production rate (in thousand cubic feet per day) may not exceed—
exceed—	but does not exceed—	
6,000	6,500	217
6,500	7,000	251
7,000	7,500	290
7,500	8,000	336
8,000	8,500	388
8,500	9,000	449
9,000	9,500	519
9,500	10,000	600
10,000	10,500	693
10,500	11,000	802
11,000	11,500	927
11,500	12,000	1,071
12,000	12,500	1,238
12,500	13,000	1,432
13,000	13,500	1,655
13,500	14,000	1,913
14,000	14,500	2,212
14,500	15,000	2,557

(C) No well drilled into the recommended tight formation is expected to produce, without stimulation, more than five barrels of crude oil per day.

(D) If the formation or any portion thereof was authorized to be developed by infill drilling prior to the date of determination and the jurisdictional agency has information which in its judgment indicates that such information or portion subject to infill drilling can be developed absent the incentive price established in paragraph (a) of this section then the jurisdictional agency shall not include such formation or portion thereof in its determination.

(ii) The jurisdictional agency may designate as a tight formation any formation which meets the guide-

lines contained in paragraph (c)(2)(i)(B) and (C) of this section, but does not meet the guideline contained in paragraph (c)(2)(i)(A) of this section, if the jurisdictional agency makes an adequate showing that the formation exhibits low permeability characteristics and the price established in paragraph (a) of this section is necessary to provide reasonable incentives for production of the natural gas from the determined formation due to the extraordinary costs associated with such production.

(3) *Notice to the Commission* Any jurisdictional agency making a determination that a natural gas formation qualifies as a tight formation will provide timely notice in writing of the determination to the Commission. Such notice shall include substantiation provided in paragraph (4) of this section and be in the manner prescribed in § 274.104 of this chapter.

(4) *Content of determinations.* A determination that a formation qualifies as a designated tight formation shall contain the following information:

(i) Geological and geographical descriptions of the formation which is determined to qualify as a tight formation.

(ii) Geological and engineering data to support the determination and the source of that data;

(iii) A map which clearly loactes wells which are currently producing from the determined tight formation or a list locating all wells which are currently producing natural gas from the determined tight formation.

(iv) A report of the extent to which existing State and Federal regulations will assure development of the determined tight formation will not adversely affect any fresh water aquifers (during both hydraulic fracturing and waste disposal operations) that are or are expected to be used as a domestic or agricultural water supply;

(v) If the formation is determined under paragraph (c)(2)(ii) of this section, the types and extent of en-

hanced production techniques which are expected to be necessary and the estimated expenditures necessary for employing those techniques; and the degree of increase in production to be expected from use of such techniques and engineering and geological data to support that estimate; and

(vi) Any other information which the jurisdictional agency deems revelant.

(5) *Commission review of determinations.* Upon receipt of a determination submitted in accordance with this section, the Commission will review the jurisdictional agency's determination in accordance with the procedures established in Part 275 of this chapter.

* * * *

18 C.F.R. § 275.205 Procedure for reopening determinations.

(a) *Grounds.* At any time subsequent to the time a determination becomes final pursuant to this subpart, the Commission, on its own motion, or in response to a petition filed by any person aggrieved or adversely affected by the determination, may reopen the determination if it appears that:

(1) in making the determination, the Commission or the jurisdictional agency relied on any untrue statement of material fact; or

(2) there was omitted a statement of material fact necessary in order to make the statements made not misleading, in light of the circumstances under which they were made to the jurisdictional agency or the Commission.

(b) *Contents of petition.* A petition to reopen the determination proceedings shall contain the following information, under oath:

(1) the name and address of the person filing the petition;

(2) the interest of the petitioner in the outcome of the determination proceeding;

(3) the statement of material fact that is alleged to be untrue or omitted;

(4) a statement explaining why the outcome of the determination proceeding would have been different had the statement or omission not occurred; and

(5) copies of all documents relied on by the petitioner, or references to such documents if they are contained in the public files of the Commission.

(c) *Procedures after reopening.* In the event the Commission reopens a determination pursuant to this section it shall:

(1) give notice to the jurisdictional agency and all persons who participated, before both that agency and the Commission, in the proceedings resulting in the determination in question;

(2) permit the jurisdictional agency and other persons receiving notice pursuant to subparagraph (1) to submit whatever documentary evidence such agency or persons deem relevant; and

(3) take such other action or hold or cause to be held such proceedings as it deems necessary or appropriate for a full disclosure of the facts.

(d) *Final order of Commission.* Within 150 days after issuance of the notice under paragraph (c)(1) of this section, the Commission shall issue a final order. If the Commission finds that the grounds referred to in paragraph (a) of this section exist, it shall vacate the determination, and if appropriate, order refund or other action. The right to collect the previously determined maximum lawful price shall terminate on the date of the order vacating the determination.

No. 89-1344

In the Supreme Court of the United States

OCTOBER TERM, 1989

ENSERCH EXPLORATION, INC., MANAGING GENERAL PARTNER OF EP OPERATING COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction under the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, to review an order of the Federal Energy Regulatory Commission reopening, under Section 503(d) of the Act, 15 U.S.C. 3413(d), pricing determinations for 75 natural gas wells.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1344

ENSERCH EXPLORATION, INC., MANAGING GENERAL PARTNER OF EP OPERATING COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 887 F.2d 81. The order of the Federal Energy Regulatory Commission reopening the well determinations (Pet. App. 51a-58a) is reported at 41 F.E.R.C. ¶ 61,242. The order of the Federal Energy Regulatory Commission clarifying its initial decision and dismissing rehearing (Pet. App. 80a-86a) is reported at 42 F.E.R.C. ¶ 61,075. The related order of the Federal Energy Regulatory Commission remanding the Texas Railroad Commission's designation of the Travis Peak formation (Pet. App. 59a-79a) and

its order on rehearing (Pet. App. 87a-92a) are reported at 41 F.E.R.C. ¶ 61,213, and 42 F.E.R.C. ¶ 61,074, respectively.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1989. A petition for rehearing was denied on November 30, 1989. Pet. App. 93a. The petition for a writ of certiorari was filed on February 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Under Section 503 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3413, the Federal Energy Regulatory Commission has authority to review and, in exceptional circumstances, to reopen state or federal agency determinations that certain categories of "high-cost" natural gas qualify for "incentive" prices under Section 107 of the NGPA, 15 U.S.C. 3317.[1] After protracted proceedings involving natural gas wells located in the Travis Peak formation, a substantial tract underlying 47 counties in northeastern Texas, FERC remanded to the Texas Railroad Commission its designation of that formation as qualifying to produce "high-cost" gas. FERC also reopened its review of the Texas Railroad Commission's related determinations for 75 natural gas wells in the formation. Petitioner, the owner of some of those wells, as well as others in the Travis Peak formation, challenged each of FERC's orders. This case involves petitioner's challenge only to FERC's order reopening the 75 well determinations.

[1] Congress has since repealed those statutory provisions, together with their price controls, effective January 1, 1993. See the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, §§ 2(b), 3(b)(5), 103 Stat. 158-159.

1. In Section 107 of the NGPA, 15 U.S.C. 3317, Congress sought to encourage the production of "high-cost" natural gas by authorizing "incentive" prices above otherwise applicable maximum lawful prices. One type of "high-cost" natural gas entitled to those higher prices was gas produced from a "tight formation."[2] Section 503 of the NGPA, 15 U.S.C. 3413, provides the framework for identifying "high-cost" gas, "tight formation" gas, and other types of natural gas eligible for NGPA incentive prices. Under that framework, the designation of a particular type of natural gas requires determinations by both FERC and the "local jurisdictional agency," which the NGPA defines as the "Federal or State agency having regulatory jurisdiction with respect to the production of natural gas," Section 503(c)(1) of the NGPA, 15 U.S.C. 3413(c)(1).

a. The local jurisdictional agency first determines the eligibility of certain types of natural gas for incentive prices. See Section 503(a) of the NGPA, 15 U.S.C. 3413(a). The Commission then reviews that determination and must take one of three courses of action within specified periods of time. First, the Commission may reverse the local agency's determination if it concludes that the determination "is not supported by substantial evidence in the record upon which

---

[2] As the court of appeals explained, a "tight formation is a sedimentary layer of rock cemented together in such a manner so as to restrict or impede the flow of the gas through the rock." Pet. App. 2a n.1; see Order No. 99, 45 Fed. Reg. 56,034 (1980), FERC Stats. & Regs. (CCH) Preambles ¶ 30,183 (1980) (codified at 18 C.F.R. 271.703 (1989)), aff'd, *Pennzoil Co.* v. *FERC*, 671 F.2d 119 (5th Cir. 1982).

In recent orders, FERC has removed natural gas produced from tight formation wells spudded or recompleted after May 12, 1990, from the category of "high-cost" gas entitled to incentive prices. *Limitation on Incentive Prices for High-Cost Gas to Commodity Values*, Order No. 519, 55 Fed. Reg. 6367 (Feb. 23, 1990), reh'g denied, Order No. 519-A (Apr. 13, 1990).

such determination was made." Section 503(b)(1)(A) of the NGPA, 15 U.S.C. 3413(b)(1)(A). Second, the Commission may remand the local agency's determination if it concludes that the determination "is not consistent with information contained in the public records of the Commission, and which is not part of the record upon which such determination was made." Section 503(b)(2)(A) of the NGPA, 15 U.S.C. 3413(b)(2)(A).

Finally, if the Commission neither reverses nor remands the local agency's determination within applicable time limits (or does not expressly affirm), that determination becomes final. Pet. App. 3a-4a. Once final, the determination is "binding" unless one of two conditions identified in Section 503(d) of the NGPA, 15 U.S.C. 3413(d), is later determined to exist: (1) either the Commission or the local agency "relied on any untrue statement of a material fact," Section 503(d)(1)(A) of the NGPA, 15 U.S.C. 3413(d)(1)(A), or (2) "there was omitted a statement of material fact necessary in order to make the statements made not misleading," Section 503(d)(1)(B) of the NGPA, 15 U.S.C. 3413(d)(1)(B). Commission action taken in either of these circumstances is referred to as a "reopening." See 18 C.F.R. 275.205; Pet. App. 106a-107a.

b. Section 503 of the NGPA, 15 U.S.C. 3413, provides for judicial review of certain actions taken by FERC under this framework. Section 503(b)(4) specifically provides for review in the courts of appeals of a FERC action taken under Section 503(b)(1) or (2), namely, where the Commission reverses or remands the local jurisdictional agency's "high-cost" gas determination. Aside from those two circumstances, however, Section 503(c)(4) provides that any FERC determination made under Section 503 "shall not be subject to judicial review under any Federal or State law." See *Williston Basin Interstate Pipeline Co.* v. *FERC*, 816 F.2d 777, 782-783 (D.C. Cir. 1987), cert. denied, 484 U.S.

1025 (1988); *Mesa Petroleum Co.* v. *FERC*, 688 F.2d 1014, 1015-1016 (5th Cir. 1982).[3]

2. Petitioner, a natural gas producer, owns and operates natural gas wells in the Travis Peak formation, a substantial tract underlying 47 counties in northeastern Texas. In November 1981, the Texas Railroad Commission designated the Travis Peak formation as a "tight formation" under Section 503(a) of the NGPA, 15 U.S.C. 3413(a), and so notified FERC of its recommendation. After a series of exchanges between FERC and the state agency, FERC eventually issued a final rule in May 1986. That rule for the most part adopted the Texas Railroad Commission's recommendation and therefore designated most, but not all, of the Travis Peak formation as a "tight formation" qualified to produce "high-cost" gas. Order No. 450, 51 Fed. Reg. 19,164 (1986), FERC Stats. & Regs. (CCH) Preambles ¶ 30,698 (1986); Pet. App. 17a-27a.

Petitioner and other Travis Peak natural gas producers thereafter filed applications with the Texas Railroad Commission "to secure individual tight formation well determinations for certain Travis Peak wells already completed." Pet. App. 5a n.6. The Texas Railroad Commission approved those applications. In August 1986, the Texas Railroad Commission forwarded to FERC 75 individual notices of determination that completed Travis Peak wells qualified for higher tight formation prices. Since FERC did not reverse or remand those determinations within 45 days, as provided by Section 503(b) of the NGPA, 15 U.S.C.

[3] Section 506(a)(4) of the NGPA, 15 U.S.C. 3416(a)(4), generally provides for review of "any final order issued by the Commission * * * in the United States Court of Appeals for any circuit in which the party to which such order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit."

3413(b), the determinations became final. See Pet. App. 5a n.6

In the meantime, Delhi Gas Pipeline Corporation, an intrastate pipeline that purchased Travis Peak natural gas, in June 1986 had filed with FERC a petition for rehearing of the May 1986 final rule designating Travis Peak as a "tight formation." Delhi contended that recent empirical studies suggested that the Texas Railroad Commission had based its initial designation on inadequate and outdated data. Pet. App. 5a-6a. In January 1987, FERC granted Delhi's petition for rehearing, vacated the May 1986 final rule, and reopened the record for further rulemaking proceedings. Order No. 450, 52 Fed. Reg. 2401 (1987), FERC Stats. & Regs. (CCH) Preambles ¶ 30,724 (1987); Pet. App. 28a-41a.

In July 1987, as a result of the District of Columbia Circuit's decision in *Williston Basin Interstate Pipeline Co.* v. *FERC*, *supra*, FERC cancelled further rulemaking proceedings.[4] At the same time, however, FERC issued a "notice of preliminary finding" to remand the designation of the Travis Peak formation as a "tight formation" to the Texas Railroad Commission for consideration of the recent Travis Peak studies. *Texas R.R. Comm'n, Travis Peak Formation*, 40 F.E.R.C. ¶ 61,100 (1987); Pet. App. 42a-50a. Petitioner, along with other Travis Peak natural gas producers, filed comments with FERC opposing the remand to the state agency.

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[4] In *Williston Basin Interstate Pipeline Co.* v. *FERC*, 816 F.2d at 782-783, the court of appeals held that the Commission must review "tight formation" designations under Section 503 of the NGPA, 15 U.S.C. 3413, rather than under the Commission's general rulemaking authority in Section 501 of the NGPA, 15 U.S.C. 3411.

In response to that decision, the Commission also issued a rule in July 1987 requiring review of tight formation designations only under the procedures in Section 503 of the NGPA, 15 U.S.C. 3413. See Pet. App. 6a n.7, 46a n.8.

3. On November 25, 1987, FERC issued its final order reaffirming the remand of the Travis Peak determination proceeding to the Texas Railroad Commission. *Texas R.R. Comm'n, Travis Peak Formation*, 41 F.E.R.C. ¶ 61,213 (1987); Pet. App. 59a-79a. FERC determined that under Section 503(b)(2) of the NGPA, 15 U.S.C. 3413(b)(2), the Texas Railroad Commission's "tight formation recommendation for the Travis Peak area is not consistent with information contained in the public records of [FERC], and which is not part of the record upon which the determination was made." Pet. App. 60a. Accordingly, FERC remanded "the determination * * * to [the state agency] for such further action as it deems appropriate." *Ibid.*[5]

On that same day, FERC exercised its authority under Section 503(d) of the NGPA, 15 U.S.C. 3413(d), and reopened the 75 final well category determinations previously made for the Travis Peak formation. *Texas R.R. Comm'n, Travis Peak Formation*, 41 F.E.R.C. ¶ 61,242 (1987); Pet. App. 51a-58a. In light of the parallel proceedings involving the remand to the Texas Railroad Commission, FERC determined that those well category determinations were "based on an untrue statement of fact, namely that Travis Peak is designated a tight formation, and must be reopened." Pet. App. 57a. FERC deferred all further action on those well category determinations pending the Texas Railroad Commission's reexamination of the tight formation designation for the Travis Peak formation. *Id.* at 57a-58a.[6]

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[5] In January 1988, FERC dismissed requests filed by petitioner and others for rehearing of its remand order. *Texas R.R. Comm'n, Travis Peak Formation*, 42 F.E.R.C. ¶ 61,074 (1988); Pet. App. 87a-92a.

[6] In January 1988, FERC clarified its reopening order and otherwise dismissed requests filed by petitioner and others for rehearing of that order. *Texas R.R. Comm'n, Travis Peak Formation*, 42 F.E.R.C. ¶ 61,075 (1988); Pet. App. 80a-86a. The Commission rejected peti-

4. In October 1989, the court of appeals denied the petition for review of the Commission's remand order and dismissed the petition for review of its reopening order. Pet. App. 1a-14a.[7] In the court of appeals, petitioner renewed the contention that FERC exceeded its authority under Section 503(d) by reopening the otherwise final Travis Peak well determinations. See Pet. C.A. Br. 36-44; Pet. C.A. Reply Br. 14-25. The court of appeals, however, did not reach the merits of that claim, holding that it lacked jurisdiction to review the Commission's order under the NGPA. Pet. App. 12a-13a.

The court explained that Section 503(c)(4) of the NGPA, 15 U.S.C. 3413(c)(4), governs judicial review of Section 503 well category determinations, and that Section 503(c)(4), in conjunction with Section 503(b) of the NGPA, 15 U.S.C. 3413(b), "limits judicial review of the Commission's determinations to those cases in which the Commission either reverses the determination of a jurisdictional agency or remands the matter for further consideration." Pet. App.

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tioner's claim that its order violated Section 503(d). Pet. App. 85a. As the Commission explained:

> Tight formation well category determinations are dependent upon the existence of an underlying determination that the formation in which the wells are drilled qualifies as a tight formation. Without a tight formation designation there can be no entitlement to the NGPA section 107(c) (5) [incentive] price.

Pet. App. 85a.

[7] The court of appeals rejected petitioner's challenge to FERC's order remanding, under Section 503(b)(2)(A) of the NGPA, 15 U.S.C. 3413(b)(2)(A), the Travis Peak determination proceeding to the Texas Railroad Commission. Pet. App. 9a-12a. The court concluded that FERC "pursued a reasonable and prudent course of action in remanding the tight field designation to the Texas Railroad Commission." *Id.* at 11a. Petitioner has sought no further review of that aspect of the court of appeals' judgment. See Pet. 10 n.7.

12a-13a; see p. 4, *supra*. Since the Commission's reopening order did not fall within either of those categories, the court concluded that review was unavailable.

The court of appeals rejected petitioner's assertion that it had jurisdiction under the general review provision in Section 506 of the NGPA, 15 U.S.C. 3416. See note 3, *supra*. The court observed that, under Section 503(b) of the NGPA, 15 U.S.C. 3413(b), it was "invested with appellate jurisdiction of [jurisdictional agency determinations] *only* where the Commission reverse[s] or remands them." Pet. App. 13a (quoting *Mesa Petroleum Co.* v. *FERC*, 688 F.2d at 1016 (emphasis and brackets in original)). The court therefore held that jurisdiction could not lie under Section 506 where it was "clear that the drafters of the [NGPA] intended to preclude our review of section 503 orders except in the limited instances prescribed in section 503(b)." Pet. App. 13a (quoting *Mesa Petroleum Co.* v. *FERC*, 688 F.2d at 1016 (brackets in original)).

ARGUMENT

The decision of the court of appeals correctly applies the judicial review provisions of the NGPA and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the question whether decisions to reopen well category determinations are judicially reviewable is of limited practical significance because the Commission has only rarely exercised its authority under Section 503(d) to reopen well category determinations, and acted here only because of the "unusual and obviously protracted procedural history" of the case. Pet. App. 77a. In addition, the issue is of diminishing importance given Congress's repeal of NGPA price controls, including Section 503, effective January 1, 1993. See note 1, *supra*. Accordingly, further review of petitioner's contention regarding review of the Commission's reopening order is not warranted.

1. Petitioner renews its contention (Pet. 15-21) that Section 506 of the NGPA, 15 U.S.C. 3416—the general review provision of the NGPA—vests jurisdiction in the court of appeals over the Commission's order to reopen well category determinations under Section 503(d) of the NGPA, 15 U.S.C. 3413(d). That claim, however, errs in glossing over the pertinent review provisions for Commission orders pertaining to gas pricing determinations entered under Section 503 of the NGPA.

Section 503 of the NGPA, 15 U.S.C. 3413, by its terms provides for judicial review of only certain actions taken under that provision. Section 503(b)(4) specifically provides for review of a FERC action taken under Section 503(b)(1) or (2), namely, a decision either reversing or remanding the local jurisdictional agency's "high-cost" gas determination. Aside from those two types of orders, however, Section 503(c)(4) provides that any FERC or local agency "high-cost" gas determination initially made under Section 503(a)(1) "shall not be subject to judicial review under any Federal or State law except as provided under [Section 503(b)]," 15 U.S.C. 3413(c)(4). See *Williston Basin Interstate Pipeline Co.* v. *FERC*, 816 F.2d at 782-783; *Mesa Petroleum Co.* v. *FERC*, 688 F.2d at 1015-1016.[8] The Commission's order here—reopening an otherwise final local agency well determination—which by its terms is neither a "reversal" nor a "remand" of that decision under Section 503(b)(1) or (2) of the NGPA, 15 U.S.C. 3413(b)(1) or (2), falls outside the appellate jurisdiction conferred by the statute.[9]

[8] For that reason, petitioner is wrong in asserting (Pet. 18-19) that a Commission reopening order under Section 503(d) is not subject to the express judicial review provisions in Sections 503(b) and 503(c)(4).

[9] A Commission order affirming a state agency's determination under Section 503 likewise falls outside the appellate jurisdiction conferred by the statute, a proposition petitioner accepts. Pet. 18; see *Mesa Petroleum Co.* v. *FERC*, 688 F.2d at 1015-1016.

Petitioner therefore mistakenly relies on the "express terms" (Pet. 15) of Section 506 to provide the jurisdiction otherwise lacking in Section 503. That general review provision may not trump the specific jurisdictional provision Congress enacted for particular Commission orders, *i.e.*, orders arising out of local agency "high-cost" gas determinations under Section 503. Cf. *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 n.20 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974). As the District of Columbia Circuit has held, "judicial review of 'tight formation' designations is available only as provided in section 503(b)." *Williston Basin Interstate Pipeline Co.* v. *FERC*, 816 F.2d at 783; see *Midwest Gas Users Ass'n* v. *FERC*, 833 F.2d 341, 350 (D.C. Cir. 1987) (Section 503 "governs administrative and judicial review of local agency determinations.").[10]

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[10] Petitioner seeks to rely on the floor statement of Representative Dingell as evidence that "Section 506 was intended *only* to preclude judicial review of Commission Section 503(b) action *affirming* jurisdictional agency determinations." Pet. 20. But a full recitation of that statement—as opposed to petitioner's abbreviated version (*ibid.*)—refutes petitioner's contention and otherwise confirms the validity of the court of appeals' holding that Section 506 may not provide jurisdiction to review agency action under Section 503. As Representative Dingell stated:

> Section 506(a)(1) does not now fully reflect the separate judicial review procedures established under section 503. Section 506(a)(1) should have included a parenthetical exclusion "(other than a final finding by the Commission under section 503(b)(1))." * * * However, the conferees are confident that these modifications are not essential to the proper operation of section 506 judicial review provisions. Applying *the rule of statutory construction that the specific controls the general*, the conferees believe that the courts will properly apply these sections in a manner consistent with the explanation found on pages 118-119 of the Joint Statement of Managers. In particular the judicial review requirements of section 503(b) are intended to be distinct from the judicial review pro-

2. Petitioner also errs in contending (Pet. 11-14) that the decision of the District of Columbia Circuit in *ANR Pipeline Co.* v. *FERC*, 870 F.2d 717 (1989), conflicts with the decision below. In *ANR Pipeline Co.*, FERC decided not to exercise its Section 503(d) authority to reopen the well category determinations of the local jurisdictional agency. See 870 F.2d at 720. Thus, no question was presented in that case concerning the reviewability of an affirmative decision by FERC to reopen a well category determination under Section 503(d), and thus there was no need to apply the specific judicial review provisions of Section 503.

Indeed, in *ANR Pipeline Co.*, the court of appeals assumed—without addressing the jurisdictional issue petitioner presents here—that it had jurisdiction to review the Commission's failure to exercise its authority under Section 503(d) to reopen local agency well determinations. The court's only discussion of its jurisdiction to review the Commission's order is limited to a citation to Section 503(b) and its remark that "[i]f the Commission remands or reverses, its action is subject to judicial review." 870 F.2d at 719.

On the other hand, the courts that have addressed the claim petitioner presents here—the decision below and the court of appeals' prior decision in *Mesa Petroleum Co.* v. *FERC*, *supra*—have rejected any application of Section 506 to provide review for orders entered under Section 503. In *Mesa Petroleum Co.* v. *FERC*, *supra*, the Fifth Circuit

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visions set forth in section 506. Accordingly, section 503(c)(4) specifically provides that *judicial review of section 503 determinations is to be available only under the provisions of section 503(b).*

124 Cong. Rec. 38,367 (1978) (emphases added).

In *Mesa Petroleum Co.* v. *FERC*, *supra*, the court of appeals expressly relied on that full statement to reject the contention raised by petitioner here and therefore concluded that "the drafters of the [Natural Gas Policy] Act intended to preclude our review of § 503 orders except in the limited instances prescribed in §503(b)." 688 F.2d at 1016.

reviewed the language and "crystal clear" legislative history of Section 503 and concluded that that provision alone "invested [the court] with appellate jurisdiction of [local agency] determinations only where the Commission reverses or remands them [under Section 503(b)(1) or (2)]." 688 F.2d at 1015, 1016; accord Pet. App. 13a. As *Mesa Petroleum* noted, "[i]f all § 503 orders [were] reviewable under the general jurisdictional grant of § 506(a)(1), then § 503's provisions limiting jurisdiction [would be] meaningless." 688 F.2d at 1016. Accordingly, there is no conflict among the courts of appeals concerning the reviewability of a Commission order, under Section 503(d), reopening otherwise final local agency well determinations.

3. Despite petitioner's suggestion (Pet. 14), the practical significance of the question presented does not call for this Court's intervention. The Commission is reluctant to exercise its authority under Section 503(d) to reopen well category determinations. See, *e.g.*, *ANR Pipeline Co.* v. *FERC*, 870 F.2d 717 (D.C. Cir. 1989); *Mobil Oil Exploration & Producing Southeast Inc.*, 34 F.E.R.C. ¶ 61,211 (1986). For that reason alone, petitioner errs in claiming (Pet. 14) that the court of appeals' decision threatens to unsettle those well determinations already made final under Section 503. Here, the Commission took the extraordinary step of exercising its reopening authority under Section 503(d) only because of the "unusual and obviously protracted procedural history" of the case. Pet. App. 77a. Those circumstances, which petitioner highlighted in the court below, see Pet. C.A. Br. 26-35, are not likely to recur.[11]

[11] Indeed, in light of the Commission's recent orders, see note 2, *supra*, natural gas produced from tight formation wells spudded or recompleted after May 12, 1990, no longer qualifies for incentive prices under the NGPA.

Moreover, the procedural question at issue – as opposed to any substantive economic consequences of Commission pricing decisions under the NGPA, cf. *FERC* v. *United Distrib. Cos.*, petition for cert. pending, No. 89-1453 (filed Mar. 15, 1990), – is of diminishing importance given Congress's repeal of NGPA price controls, including Section 503, effective January 1, 1993. See note 1, *supra*. Accordingly, further review of petitioner's contention regarding review of the Commission's reopening order is not warranted.[12]

[12] In any event, the practical effect of the court of appeals' decision only postpones, rather than precludes, judicial review of the Commission's ultimate decision regarding the well determinations. FERC will not take any action on the reopened well determinations until after the Texas Railroad Commission decides, on remand, whether the Travis Peak formation should be designated again as a tight formation. See Pet. App. 57a, 84a-85a. If the state agency redesignates the Travis Peak formation, and the Commission agrees, the Commission will then reinstate the well determinations at issue. Petitioner, of course, would then have no reason to seek further review. If, on the other hand, the state agency redesignates the Travis Peak formation, and the Commission either reverses or remands that designation, the Commission's actions with respect to the well determinations would then be subject to review under Section 503(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ENSERCH EXPLORATION, INC., AS
MANAGING GENERAL PARTNER OF
EP OPERATING COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Enserch Exploration, Inc., as Managing General Partner of EP Operating Company ("EPO"), hereby submits this reply brief to the Brief of the Federal Energy Regulatory Commission ("Commission") in opposition to EPO's petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

I. THE COURTS OF APPEALS HAVE GENERAL JURISDICTION TO REVIEW ORDERS IN WHICH THE AGENCY BELOW IS ALLEGED TO HAVE EXCEEDED ITS AUTHORITY.

The Commission's orders reopening Natural Gas Policy Act of 1978 ("NGPA") Title I determinations, in which the Commission purported to act under Section 503(d) of the NGPA, 15 U.S.C. § 3413(d), are subject to judicial review in the United States Courts of Appeals pursuant to the general review provision of the NGPA, Section 506(a)(4). 15 U.S.C. § 3416(a)(4). The Commission blurs the distinction between "determinations" of Title I category and "reopening" of *final* determinations. Commission Br. at 2, 10.[1]

The Commission's repeated citations to *Williston Basin Interstate Pipeline Co.* v. *FERC*, 816 F.2d 777 (D.C.Cir. 1987), *cert. denied*, 484 U.S. 1025 (1988), *Mesa Petroleum Co.* v. *FERC*, 688 F.2d 1014 (5th Cir. 1982) are inapposite, because neither of those cases involve reopening of a *final* determination under Section 503(d) of the

[1] The Commission's brief states that in the orders on review, the Commission "reopened its *review* of the *Texas Railroad Commission's* . . . determinations for 75 gas wells in the formation." Commission Br. at 2 (emphasis added). This sentence implies that the Commission's review of the Texas Railroad Commission's determinations was not complete. In fact, however, long before the Commission issued the orders on review, the Commission's review of the TRC's determinations had been completed. At the time the Commission reopened the well determinations in November 1988, those determinations had been "final" under the applicable provisions of the NGPA since 1986. Pet. App. 35a n.15.

NGPA; in both of those cases, the Courts of Appeals reviewed actions of the Commission *affirming* jurisdictional agency determinations under Section 503(b). The Fifth Circuit recognized the distinction between the initial determination that gas qualified for a certain price category and action to subsequently reopen that determination. The Fifth Circuit chided the Commission for misapplying the statute. Pet. App. 13a, n.10. However, the Fifth Circuit did not correct the Commission's error, finding that it lacked jurisdiction to do so.

The Commission now argues that "the general review provision [of the NGPA] may not trump the specific jurisdictional provision Congress enacted for particular Commission orders . . . under Section 503." Commission Br. at 11. The Commission misreads the NGPA, interpreting the statute in a manner inconsistent with basic principles of statutory construction and the legislative history of the NGPA. EPO Pet., 15-21.[2] Moreover, as a general matter, the Courts of Appeals have jurisdiction to review claims that an agency acted in excess of its statutory authority. The Commission reopened seventy-five tight formation well determinations based on an erroneous finding that EPO and the other Travis Peak well operators made "untrue statements of material fact" to the TRC. However, the Fifth Circuit found that there was no untrue statement of material fact. If EPO did not make an "untrue statement of material fact," then plainly the Commission had no basis under Section 503(d) upon which to reopen the seventy-five well determinations. Thus, the Commission exceeded its authority.

In *Leedom* v. *Kyne*, 358 U.S. 184 (1958), this Court held that the courts could review agency action on a con-

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[2] In general, "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Abbot Laboratories v. Gardner, 387 U.S. 136, 140 (1967). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.*, at 141. *See also* Rusk v. Cort, 369 U.S. 367, 379-380 (1962); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

tention that the agency had exceeded its statutory authority, even if the enabling statute did not authorize judicial review. Specifically, this Court held that a Federal District court had jurisdiction to consider an original suit to set aside the National Labor Relations Board's determination that certain non-professional employees of Westinghouse Company could be included in a voluntary unincorporated labor organization of professional engineers for purposes of establishing a collective bargaining representative.[3]

The Federal District Court heard the suit on the complaint of the labor organization. The court found that it had jurisdiction and set aside the NLRB's determination of the bargaining unit. The NLRB appealed to the District of Columbia Circuit. The Board did not contest the District Court's conclusion that the NLRB had acted in excess of its powers and had injured the statutory rights of the professional employees. The Board contended only that the District Court lacked jurisdiction. However, the District of Columbia Circuit affirmed the District Court.

This Court affirmed the District Court and the District of Columbia Circuit, stating that "[t]his suit is not 'review,' in the sense of that term as used in the Act, of a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U.S. 184, 189. This Court found this "right to sue" to exist generally under "the law," apart from the review provisions of the

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[3] Section 9(b)(1) of the National Labor Relations Act, 29 U.S.C. § 159(b)(1), provided that in determining the "unit" appropriate for collective bargaining purposes, "the board shall not . . . decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." Section 9(d) of the NLRA provided for judicial review of establishment of units only after the election had been held and the Board had ordered the employer to do something predicated on the results of the election.

NLRA. *Id.*, at 189. Of course, the NGPA contains a general review provision, which does not preclude judicial review of the Commission's Order. 15 U.S.C. § 3416(a)(4).

This Court "cannot lightly infer that congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U.S. at 190, *citing* cf. *Harmon* v. *Brucker*, 355 U.S. 579 (1958); *Stark* v. *Wickard*, 321 U.S. 288 (1944); *School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902). The purpose of NGPA Section 503(d) is to ensure that the well determination procedure achieves finality expeditiously, thus achieving certainty for gas producers, all as part of an incentive to explore for and develop new gas reserves. Consistent with this objective, final determinations cannot be disturbed in the absence of concealment of relevant facts. Congress plainly intended "judicial protection" of this right conferred upon producers.

Further support for the proposition that appellate courts have jurisdiction to review agency orders that are challenged on the grounds that they exceed the agency's statutory authority is found in *Trans-Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978). In *TAPS*, this Court affirmed the jurisdiction of the courts of appeals to review orders issued by the Interstate Commerce Commission under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), suspending initial tariff schedules of an interstate carrier. This Court noted that in earlier decisions, it held that the appellate courts did not have jurisdiction to review ICC suspension orders. 436 U.S. at 638-639 n.17, *citing Arrow Transportation Company* v. *Southern Railway Company*, 372 U.S. 658 (1963); *United States* v. *SCRAP*, 412 U.S. 669 (1973). This Court distinguished *TAPS* on the grounds that it was not reviewing the ICC's evaluation of the "reasonableness" of the rates, but the authority of the ICC to suspend initial rates. This Court concluded that the Con-

gress did not intend to cut off judicial review of orders under the ICA for such "limited purposes." [4]

In *Abbot Laboratories*, this Court rejected contentions similar to those accepted by the Fifth Circuit below, that because the Federal Food, Drug, and Cosmetic Act included a specific procedure for judicial review of certain enumerated kinds of regulations not involved in that case, review of all other kinds was meant to be excluded. This Court rejected that analysis, finding instead that "we must go further and inquire whether in the context of the entire legislative scheme the existence of that circumscribed remedy evinces a congressional purpose to bar agency action not within its purview from judicial review." 387 U.S. at 141. In looking to the overall legislative purpose, this Court found that at the time of enactment, it was recognized that the Declaratory Judgments Act provided an appropriate remedy in equity in cases where an administrative officer has exceeded his authority and there is no remedy of law.

This case presents a question similar to that presented by *Leedom*, *Abbot Laboratories* and *TAPS*. EPO does not ask the Court to determine whether the Commission appropriately applied the statutory tests for disturbing well category determinations. Of course, EPO asserts that the Commission erred in its application of Section 503(d); indeed, the Fifth Circuit has already stated that the Commission misapplied Section 503(d). EPO contends that the Fifth Circuit erred when it held that it could not review the Reopening Order, even to address EPO's contention that the Commission exceeded its authority under Section 503(d). If this Court finds that the courts of appeals have authority to review such questions, this Court should remand to the Fifth Circuit for further proceedings as are appropriate, given the Fifth

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[4] Dunlop v. Bachowski, 421 U.S. 560, 567 (1975) (appellate jurisdiction to review decision of the Secretary of Labor not to bring a civil action under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481, to set aside a union election); Abbot Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967).

Circuit's previous conclusion that the Commission has misapplied Section 503(d).

II. THE FIFTH CIRCUIT'S OPINION IS SQUARELY IN CONFLICT WITH OPINIONS OF THE DISTRICT OF COLUMBIA CIRCUIT.

The Commission strains to distinguish *ANR Pipeline Company* v. *FERC*, 870 F.2d 717 (D.C.Cir. 1989), and fails. Commission Br. at 12-13. *ANR* is in direct conflict with the Fifth Circuit's decision in this case. The fact that *ANR* affirms a Commission decision *not* to reopen a final well determination under NGPA Section 503(d) does not contradict the basic fact that the District of Columbia Circuit asserted its jurisdiction to review those Commission orders. Even if the *outcome* of the exercise of jurisdiction was affirmance of the orders below, the reviewing court obviously exercised its jurisdiction to review the orders. The Commission's alternative argument, that the District of Columbia Circuit simply "assumed," incorrectly, that it had jurisdiction in *ANR*, is contradicted by *Williston*. In *Williston*, the same court undertook a *sua sponte* analysis of its jurisdiction to review Commission orders under Section 503 affirming jurisdictional agency determinations. See EPO Pet. at 13 n.8; *Williston*, 816 F.2d at 781 n.78. That Court determined that it *lacked* jurisdiction and dismissed the petition for review. Thus, it is incorrect to "assume" that the District of Columbia Circuit exercised its jurisdiction unconsciously in *ANR*. That court knowingly asserted its jurisdiction under Section 506(a)(4) to review the Commission's orders. The Fifth Circuit did the opposite in this case.

III. THE FIFTH CIRCUIT'S HOLDING UNDERMINES THE INTEGRITY OF THE CATEGORY DETERMINATION PROVISIONS OF THE NGPA.

The practical consequences of this case are very real and potentially far-reaching, despite the Commission's attempts to trivialize this matter. The Commission states that it is reluctant to exercise its authority to reopen well determinations, yet in this case the Commission reopened

seventy-five determinations. EPO's lost revenues as a result of the Commission's actions reach into the tens of millions of dollars. The Commission cites "the unusual and obviously protracted history" of this case as a justification for reopening the determinations, but examination of the text of the order drawn upon (Pet. App. 77) shows that this consideration was the basis for the remand of the Travis Peak Formation determination to the TRC, not for the reopening of the individual well determinations. While it is certainly to be hoped that the decade-long designation process endured by producers operating in the Travis Peak Formation will not be a recurring phenomenon at the Commission, *this* case involves the reopening of final determinations involving individual wells, not the determination of the Travis Peak Formation as a "tight formation." Moreover, this case is not unique, as exemplified by *ANR* and *Mobil Oil Exploration & Producing Southeast Inc.*, 34 F.E.R.C. (CCH) Para. 61,211 (1986).

The Commission argues that the question presented is of "diminishing importance," due to the recent enactment of the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 102 Stat. 157 (1989). Under the 1989 Act, Congress repealed the remaining price and nonprice controls on producer sales of natural gas effective January 1, 1993. In addition, the 1989 Act provides for interim decontrol of gas sales under certain circumstances. As noted in EPO's petition (EPO Pet. at 14, n.9), the Commission solicited comments on the desirability of continuing the well determination process for gas that has been decontrolled, because of significant tax incentive implications, in a Notice of Proposed Rulemaking published December 18, 1989. Among other categories of gas, gas produced from tight formations qualifies for a tax credit for nonconventional fuels under Section 29 of the Internal Revenue Code, 26 U.S.C. 29(c)(1)(B). Since the filing of EPO's petition in this case, the Commission has issued a final rule on the 1989 Act. The Commission received comments from twenty-one parties regarding the

well determinations issue, all but one of which favored continuation of the determination process. In response to these comments, the Commission indicated that it will continue to process well determinations until January 1, 1993, "in order to allow producers to obtain tax credits that are dependent upon such determinations even if the gas has been otherwise decontrolled." *Order Implementing the Natural Gas Wellhead Decontrol Act of 1989*, 55 *Fed. Reg.* 17425, 17427 (April 25, 1990). Finally, the Commission suggests that the practical effect merely postpones review of the Commission's decision, because the Commission will not take any action on the reopened well determinations until after the TRC decides, on remand, whether the Travis Peak should be designated again as a tight formation. Commission Br. at 14 n.12. The Commission's contention ignores the legal issue presented by this case.

In the Reopening Order, the Commission suspended the running of the 150-day period for issuance of a final order,

> in order to permit Texas to reevaluate the character of the Travis Peak in accordance with the Commission's order remanding that proceeding. . . . The Commission also believes that the status of the subject wells is *entirely* dependent upon further action by Texas with regard to Travis Peak. Consequently, comments regarding the reopening of the subject determinations are unnecessary at this time . . . .

Pet. App. 57a-58a (emphasis added). In other words, the Commission's holding that EPO made an "untrue statement of material fact" could only be modified if the Commission determines that the Travis Peak Formation qualifies as tight formation. The issue of statutory construction raised by EPO is purely legal: whether the Commission properly construed Section 503(d) as permitting reopening and vacation of NGPA determinations based upon information (*i.e.*, the Commission's January 9, 1987 order vacating the Travis Peak tight formation designation) that did not become available until after

the determinations had become final. Cf. *Abbot Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967) (agency rules constituted final agency action).

Moreover, the Commission's action is "pragmatic" in a final way. *Id.*, at 149-150. Whatever comments the Commission may be prepared to consider in response to the Reopening Order, the Commission has made it clear that it will not alter the result (*i.e.*, the Commission will vacate the final determinations) based upon comments urging the Commission to declare the well determinations final on the grounds that the determinations were not based upon any "untrue statement of material fact" arising out of the original Commission order designating the Travis Peak as a tight formation.

Thus, even though as a technical matter the Commission retains discretion to find that the well determinations may not be vacated even if the Travis Peak Formation is not determined on remand to be a tight formation, the Commission appears to have committed itself to vacating the well determinations in the event that the Travis Peak Formation is not determined to be a tight formation. *See* the Reopening Order, Pet. App. 57, quoted above, which states that the "status" (by which the Commission no doubt means "validity") of the well determinations depend "entirely" on "further action" by the Railroad Commission.

In addition, even though the Commission's regulations do not remove the right to collect the NGPA ceiling price applicable to tight formation gas until the well determinations are vacated, EPO's purchaser has withheld the price continuously. Although the Reopening Order did not "require[] an immediate and significant change in the [petitioner's] conduct of [its] affairs with serious penalties attached to noncompliance," *Abott Laboratories*, 387 U.S. at 153, it is nonetheless true that the maximum lawful ceiling price applicable to EPO's production from the affected wells is effectively cut in *half* by the Commission's action here.

The continuing uncertainty resulting from the Reopening Order has now stretched over several years. The Court held that "mere financial expense" is not a justification for pre-enforcement review.[5] However, in the context of an administrative action focused at particular parties that make significant changes in everyday business practices, financial expense can be considered as a factor weighing in favor of prompt review.

CONCLUSION

Wherefore, this Court should grant the petition to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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[5] Frothingham v. Mellon, 262 U.S. 447 (1923); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).